6

No. 83-912-CFY
Status: GRANTED

Title: Edward Luce, Petitioner
v.
United States

Docketed:
December 1, 1983

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Marcus, James I.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 1 1983	G	Petition for writ of certiorari filed.
3	Jan 5 1984		Order extending time to file response to petitior until February 3, 1984.
4	Feb 3 1984		Order further extending time to file response to petition until March 4, 1984.
5	Feb 24 1984		Brief of respondent United States in support of petition filed.
6	Feb 28 1984		DISTRIBUTED. March 16, 1984
8	Mar 19 1984		REDISTRIBUTED. March 23, 1984
9	Mar 26 1984		Petition GRANTED. Justice Stevens OUT.
			**********
11	May 4 1984		Order extending time to file brief of petitioner on the merits until June 1, 1984.
12	May 11 1984		Joint appendix filed.
13	May 31 1984		Brief of petitioner Edward Luce filed.
14	Jun 23 1984		Record filed.
15	Jun 23 1984		Certified copy of joint appendix & C.A. proceedings received.
17	Jun 29 1984		Order extending time to file brief of responcent on the merits until July 23, 1984.
18	Jul 24 1984		Brief of respondent United States filed.
19	Aug 8 1984		CIRCULATED.
20	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 3, 1984. (4th case)
21	Aug 30 1984	G	Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument pro hac vice filed.
22	Oct 1 1984		Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument pro had vice GRANTED. Justice Stevens OUT.
23	Oct 3 1984		ARGUED.

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83-912

No.

Office Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD LUCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Should a *motion in limine* ruling concerning a prior conviction be reviewable if a Defendant does not testify?

LIST OF PARTIES

All parties appear in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

EDWARD LUCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Edward Luce, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 713 F.2d 1236 (6th Cir. 1983) and is attached as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals (*App. infra*) was entered on August 9, 1983. A petition for rehearing

with *en banc* suggestion was denied on October 3, 1983, and is attached as Exhibit B. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

After a jury trial with co-defendants James Luigs and Robert Kolofer in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. 846 and of aiding and abetting in the possession of cocaine, in violation of 21 U.S.C. 841.[1] Petitioner was sentenced to four years imprisonment, fined and given a three year special parole term. On appeal the court affirmed the conviction (*App. infra*).

The evidence showed that on September 29, 1981, Dallas Luigs, an unindicted co-conspirator, was arrested in Memphis, Tennessee, by state narcotic agents for possession of illegal drugs (Tr. 41, 67) Upon reaching a "deal" with both federal and state agents Dallas Luigs agreed to cooperate with the authorities in exchange for more lenient treatment than he otherwise would be entitled on his case. (TR. 42-43) Pursuant to this agreement Dallas Luigs arranged for the purchase of cocaine from his cousin, James Luigs. On October 1, 1981 both James Luigs and Robert Kolofer were arrested at the Memphis International Airport. (TR. 130-131) Edward Luce, Petitioner, was never observed in the Western District of Tennessee, although later charged in the instant proceedings. At trial, the government's evidence against Luce consisted of a fingerprint lifted from one

[1] The indictment charged three counts but petitioner was acquitted on count 2, which also charged a violation of the federal drug laws.

of sixteen bags of cocaine seized during the arrest of Luce's co-defendants, as well as testimony by an unindicted co-conspirator.

Prior to trial petitioner filed a motion to limit the government's use of a 1974 felony conviction for possession of a controlled substance. The lower court ruled that the conviction could be used if the Defendant were to testify as to the merits of the case,[2] since the earlier conviction involved moral turpitude. After this ruling, Luce declined to testify in his own behalf. (TR. 423-425)

Notwithstanding a plethora of contrary case law dating back several years, involving literally hundreds of federal cases in virtually every federal circuit, Judge Kennedy held that Rule 609 of the Federal Rules of Evidence dictates, that a defendant who desires to testify in his own behalf cannot benefit from a *motion in limine* with respect to a prior conviction. The Court went on to hold that in the event a defendant fails to testify he waives all rights to review a trial court ruling on the admissibility of that conviction.

[2] Because evidence of flight had been admitted against Luce, the trial court held that petitioner could testify on the issue of flight absent impeachment by use of the prior conviction.

REASONS FOR GRANTING THE WRIT

The issue in this case is of paramount importance to the conduct of future criminal trials. The decision in the instant case deprives a criminal defendant of the benefits inherent in a preliminary ruling. The lack of a consistent, uniform approach among the circuits can only result in strategic inequalities depending on the location of trial. Moreover, the opinion below ignores both a wealth of case law, and the hard realities of trial strategy, by requiring a criminal defendant to take the witness stand and suffer devastating impeachment by prior felony conviction in order to preserve his objections for appellate review.

Other circuits have adopted varying and somewhat inconsistent approaches in determining the reviewability of a defendant's motion to exclude impeachment by prior conviction. By far the most common approach was for the reviewing court to reject the argument *sub silentio* and proceed to rule on the merits of the trial court's decision. (*See Generally,* 54 A.L.R. Fed. 694, and the cases cited therein). The First, Third and Fifth Circuits have considered this question specifically and concluded that review of the issue is not precluded by the defendant's failure to testify. *United States* v. *Kiendra,* 663 F. 2d 349 (1st Cir. 1981); *United States* v. *Provenzano,* 620 F.2d 985 (3rd Cir. 1980), *Cert. denied,* 449 U.S. 899, 101 S.Ct. 267, 66 L. Ed. 2d 129; *United States* v. *Langston,* 576 F.2d 1138 (5th Cir. 1978), *cert. denied* 439 U.S. 932, 99 S.Ct. 324, 58 L. Ed. 2d 327. The Ninth Circuit apparently requires that the defendant either take the stand and testify, tender an offer of proof

regarding his testimony, or outline the prospective testimony through represntations of counsel. *United States* v. *Cook,* 608 F.2d 1175 (9th Cir. 1979), *cert. denied* 444 U.S. 1034, 100 S.Ct. 706, 62 L.Ed. 2d 670.

In the instant case, counsel for the defendant repeatedly and vigorously objected to the trial court's ruling because the court failed to balance the probativeness of the prior conviction with its prejudicial effects as outlined under Rule 609 of the Federal Rules of Evidence. The record is clear that the trial court incorrectly decided the government could use the prior conviction simply because the court felt that the prior offense involved "moral turpitude". At no time did the government argue that the motion was a sham; and no indication was ever given the court to suggest that the defendant would fail to take the stand if his motion was sustained. The trial court wisely withheld ruling on the motion until the defendant was about to take the stand. After reviewing the government's evidence and with full knowledge of the issues defendant was likely to rebut when testifying, the court made its ruling. Significantly, the court never once addressed itself to the fear that ulterior motives prompted the defendant's motion. Nor did the court ever express a need for further details or an outline of the defendant's testimony so as to balance probity with prejudice. In fact, the court was of the opinion that no such balancing test was necessary, if the previous conviction involved moral turpitude.

The opinion below imposes a new and extremely harsh burden on a criminal defendant. By holding that rulings made in advance of trial are unreviewable, the Sixth Circuit needlessly deprives lower courts of a valuable litigation tool. Denying review of a trial court's errone-

ous ruling on a preliminary motion will serve only to discourage the use of those motions; yet preliminary motions conserve a jury's time and allow for a more efficient organization and presentation of the evidence. Better organization of the evidence in turn simplifies the jury's task of sorting out the issues and conflicting assertions made at trial. Thus, every effort should be made to promote, rather than inhibit, the use of preliminary motions.

A brief consideration of a defendant's position at trial reinforces a policy in favor of *in limine* motions. If the defendant testifies and is impeached with the prior conviction, he risks conviction upon the current charge simply because the jury thinks he is a bad man. On the other hand, if the defendant chooses to remain silent, the jury may conclude that he is guilty despite instructions that no inference is to be drawn against him by reason of his failure to testify. Against this background it is obvious that counsel would be assisted by advance knowledge of the court's ruling on this crucial matter. For example, the opening statement of defense counsel as well as the order of defense proof and the defendant's decision to testify will undoubtedly be affected.

In *United States* v. *Kiendra,* 663 F.2d 349 (1st Cir. 1981) the Court reviewed the government's argument that this issue was not appealable in the absence of: (A.) a basis for determining whether the defendant would testify; and (B.) the substance of his testimony. There, the court characterized the argument as "unrealistic", and further suggested that when a defendant seeks an advanced ruling on the permissibility of prior-crimes impeachment, it may be *presumed* that the defendant will in fact testify if the motion is granted. *Id.* at

352. In *Kiendra,* the court suggested that in the event the government has special reason to question a particular defendant's willingness to testify, it should address its doubts to the district court in response to the motion *in limine. Id.*

The case at bar clearly demonstrates the harshness of the approach adopted by the Sixth Circuit, as well as its inconsistency with other circuits. This court has recognized that the actual conduct and rulings at trial are significant, and legitimate factors in a defendant's election to testify or remain silent. *Brooks* v. *Tennessee,* 406 U.S. 605 (1972). In light of its highly coercive effect, an erroneous provisional ruling should not evade review merely because the party ruled against adjusts his trial strategy to meet it. In the case of *United States* v. *Cook,* 608 F.2d 1175, 1193 (9th Cir. 1979) (*En Banc*) this same issue was reviewed. There Judge Hufstedler dissented, pointing out that a defendant's goal at trial is an acquittal. Although an effective defense attorney will be scrupulous in preserving the record for appeal, he will not do so in a manner that prejudices his client's chances for acquittal. Thus, it is axiomatic that a defendant will hesitate to take the stand once the trial court has ruled that evidence of a prior felony conviction will be admitted on cross-examination.

Here, the Sixth Circuit has adopted an approach to the use of Federal Rule of Evidence 609 which ignores the realities of a criminal defendant's dilemma when confronted with impeachment by prior conviction. This approach is at odds with that utilized in all other circuits, and requires review by this court so that a uniform standard may be established to determine the reviewability a ruling allowing the use of prior conviction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to review the judgment below.

Respectfully submitted,

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APPENDIX

Nos. 82-5326
82-5338
82-5377

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD LUCE, ROBERT KOLOFER, and JAMES LUIGS,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed August 9, 1983

Before: KENNEDY, Circuit Judge; PECK, Senior Circuit Judge; and ALLEN,* District Judge.

KENNEDY, Circuit Judge. Defendants Luce, Kolofer, and Luigs appeal from their jury convictions for possession of a controlled substance with intent to distribute (21 U.S.C. § 841(a)(1)). Luce and Luigs also appeal their convictions for conspiracy to possess a controlled substance with intent to distribute (21 U.S.C. § 846). The defendants raise numerous evidentiary issues. For the reasons set forth below, we conclude that none of the

*Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

District Court's rulings require reversal and affirm the convictions.

I.

Before trial, defendant Luce moved *in limine* to prohibit the government from using evidence of a 1974 felony conviction for possession of controlled substances to impeach Luce should he take the stand. Luce's counsel did not state that Luce would take the stand if the motion were granted, nor did he indicate the substance of Luce's testimony. The district judge ruled that, if Luce testified as to the merits of his case generally, the evidence of his prior conviction would be admissible to impeach him; but Luce could take the stand to testify solely concerning his flight from police officers without exposure to impeachment by his prior conviction. Luce did not testify at trial. He now urges that the district judge's ruling was prejudicial error and that his conviction must be reversed because he was precluded from taking the stand by fear of impeachment.

Luce claims that his prior conviction was inadmissible under Federal Rule of Evidence 609(a), which states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Luce's conviction would be admissible only if the District Court properly determined that its probative value out-weighed its prejudicial effect. Such a determination is reviewable on an abuse of discretion standard. *United States* v. *Williams*, 587 F.2d 1 (6th Cir. 1978). We

need not decide whether the District Court abused its discretion here, however, as we hold that a preliminary ruling on admissibility is not reviewable on appeal when the defendant does not testify at trial and his prior convictions are not offered into evidence against him.

The only precedent in the Sixth Circuit on the question of under what circumstances a denial of motion *in limine* to exclude prior convictions is preserved for appeal is *United States* v. *LeBlanc*, 612 F.2d 1012 (6th Cir.), *cert. denied*, 449 U.S. 849 (1980).[1] In that bank robbery case, the District Court denied the defendant's motion *in limine* to exclude a prior robbery conviction. On appeal the government conceded that evidence of the conviction was admissible. This Court nonetheless affirmed the conviction, holding that the question had not been preserved for appeal. *LeBlanc* is persuasive precedent for the result we reach here but is not controlling since it rests upon multiple grounds, not all of which are present here. The Court's opinion noted five factors which supported its result: (1) defendant's counsel had not clearly argued the proper basis for concluding that the evidence was inadmissible; (2) counsel did not renew his objection to the ruling at the end of the government's case in chief; (3) counsel did not advise the court that the defendant would decline to testify because of the court's ruling; (4) counsel did not offer the substance of the defendant's testimony had he testified; and (5) it appeared that other tactical reasons may have influenced the defendant's decision not to testify.

If only the first two factors listed above were essential to the result in *LeBlanc*, Luce has properly preserved his question for appeal, as his counsel specifically argued

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[1] In *United States* v. *Williams*, 587 F.2d 1 (6th Cir. 1978), we did not reach the reviewability question since we decided that the District Court had not abused its discretion in ruling on the admissibility of prior convictions.

the conviction's inadmissibility both before trial and at the close of the government's case. If more is required, the evidence's admissibility is not reviewable. Our opinion in *LeBlanc* did not indicate which factors were essential; therefore, we must now decide whether under the circumstances in this case the ruling on the motion *in limine* to exclude prior convictions will be reviewed.

A review of the law of the other circuits on this issue reveals that only two circuits have explicitly considered the question. The Ninth Circuit will review an *in limine* ruling on admissibility of prior convictions only if the defendant establishes on the record that he will take the stand and testify if his prior convictions are excluded and sufficiently outlines his testimony on the record so that the Rule 609 balancing can be performed. *United States* v. *Cook,* 608 F.2d 1175 (9th Cir. 1979) (*en banc*), *cert. denied,* 444 U.S. 1034 (1980). *See also United States* v. *Portillo,* 633 F.2d 1313 (9th Cir. 1980), *cert. denied.* 450 U.S. 1043 (1981); *United States* v. *Hendershot,* 614 F.2d 648 (9th Cir. 1980). The *Cook* case overruled a line of Ninth Circuit cases which held that a preliminary ruling of admissibility could not be reviewed unless the defendant took the stand. *United States* v. *Fulton,* 549 F.2d 1325 (9th Cir. 1977); *United States* v. *Murray,* 492 F.2d 178 (9th Cir. 1973), *cert. denied,* 419 U.S. 942 (1974); *United States* v. *Walters,* 477 F.2d 386 (9th Cir.), *cert. denied,* 414 U.S. 1007 (1973).

The Fifth Circuit will review such a ruling whether or not the defendant has taken the stand or outlined his testimony. *United States* v. *Toney,* 615 F.2d 277 (5th Cir.), *reh'g denied,* 622 F.2d 1043, *cert. denied,* 449 U.S. 985 (1980); *United States* v. *Langston,* 576 F.2d 1138 (5th Cir.), *cert. denied,* 439 U.S. 932 (1978). On a closely related question, the First Circuit has held that a ruling *in limine* that a defendant could be impeached with prior inconsistent statements is reviewable despite the

defendant's failure to testify. *United States* v. *Hickey,* 596 F.2d 1082 (1st Cir.), *cert. denied,* 444 U.S. 853 (1979). Decisions in several other circuits have reached the merits of the trial court's ruling without discussing reviewability. *E.g., United States* v. *Provenzano,* 620 F.2d 985 (3rd Cir.), *cert. denied,* 449 U.S. 899 (1980); *United States* v. *Cavender,* 578 F.2d 528 (4th Cir. 1978); *United States* v. *Mahone,* 537 F.2d 922 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976); *United States* v. *Fearwell,* 595 F.2d 771 (D.C. Cir. 1978); *United States* v. *Smith,* 551 F.2d 348 (D.C. Cir. 1976).

With the exception of *United States* v. *Hickey,* all of the decisions that discuss reviewability found no abuse of discretion by the trial court in refusing to grant the motion *in limine.*[2] Those cases that consider reviewable a denial of a motion *in limine* to exclude impeaching evidence where such evidence is neither offered nor introduced against a defendant might therefore be classified as dicta. In any event, those cases are inconsistent with the reasoning of *LeBlanc.* Persuasive policy reasons dictate that the better rule is to require that the defendant testify and the impeaching conviction be admitted before an appellate court will review for reversible error.

A motion *in limine* is a request for guidance by the court regarding an evidentiary question. The trial court may, within its discretion, provide such guidance by making a preliminary ruling with respect to admissibility. The parties may then consider the court's ruling when

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[2] An abuse of discretion was also found in the *Cavender* and *Fearwell* decisions, which did not discuss reviewability. In *Smith,* the District of Columbia Circuit expounded on the merits generally without discussing reviewability and remanded the case to the trial court for a determination of admissibility under Rule 609. The trial court had applied the law in effect prior to the adoption of Rule 609.

formulating their trial strategy. However, we see no reason why the trial court could not change its ruling, for whatever reason, when the evidence is actually offered and objected to at trial.[3] *See United States* v. *Oakes,* 565 F.2d 170, 171-72 (1st Cir. 1977). *See also Rouse* v. *United States,* 359 F.2d 1014 (D.C. Dir. 1966) (pre-trial ruling on motion to suppress may be changed at trial). A ruling on a motion *in limine* is therefore essentially an advisory opinion by the trial court.

Predicating reversal on motions *in limine* rulings is likely to result in trial courts abandoning the use of that procedure. It is well established that the court need not rule on a motion *in limine. E.g., New Jersey* v. *Portash,* 440 U.S. 450, 462 n.1 (1979) (Powell, J. concurring); *United States* v. *Johnston,* 543 F.2d 55, 59 (8th Cir. 1976), *Houston* v. *Lane,* 501 F. Supp. 5 (E.D. Tenn. 1978), *aff'd,* 636 F.2d 1217 (6th Cir. 1980), *cert. denied,* 450 U.S. 1003 (1981). District Courts are unlikely to continue to give advisory rulings which increase the risk of retrial. The valuable benefit of *in limine* motions—a defendant's ability to prepare trial strategy with knowledge of the court's probable ruling on admissibility—would be lost.

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[3] *In limine* rulings have been held unappealable when the trial court explicitly reserved the right to change its ruling. In *United States* v. *Banks,* 687 F.2d 967 (7th Cir. 1982) the District Court, in respone to a motion *in limine* to exclude prior convictions, had said: "My posture is that I will admit it, but I want to look into the matter further." The defendant did not testify and the prior convictions were not offered into evidence. The Seventh Circuit held that this did not constitute an appealable ruling on admissibility. *See also United States* v. *Sternback,* 402 F.2d 353 (7th Cir. 1968), 402 F.2d 353 (7th Cir. 1968), *cert. denied,* 393 U.S. 1082 (1969).

When a defendant's conviction can be reserved on the basis of an erroneous ruling on a motion *in limine,* the trial court's willingness to make a preliminary ruling will provide the defendant with an additional benefit—the chance for a new trial if the appellate court finds that the evidence was not properly admitted. Compare the situation where the trial judge declines to rule on a motion *in limine* with the situation where the motion is denied and the defendant does not testify. Assuming that it would be reversible error to admit the impeaching evidence, a defendant whose motion *in limine* was denied would have two chances for acquittal: the first trial, where he would not have testified; and the second, where he could testify without impeachment. A defendant would not have such an opportunity if the trial judge declined to make a preliminary ruling. Assuming again that the impeachment is improper, a defendant in this situation who testified and was impeached would also have two chances for an acquittal. However, he would not have the opportunity to present his case once without testifying and again with his testimony unimpeached.

In addition to providing defendants with an unwarranted advantage, a trial judge's willingness to make a preliminary ruling, if such rulings were reviewable, would also enable defendants to challenge convictions that would have resulted even if the impeachment had been ruled inadmissible. This results from the reviewing court's inability to determine whether the defendant would have actually testified or whether that testimony would have resulted in an acquittal.

A trial judge who declined to make a preliminary ruling on admissibility would be following a much safer course. If the defendant were to choose not to testify, no ruling need be made. If the defendant were to testify, the judge could rule on the impeachment after hearing the defendant's actual testimony. A new trial would be ordered

only if the ruling was an abuse of discretion and was not harmless error.

A concrete factual basis is required for appellate review of the merits of the evidence's admissibility. There is no indication in the record before us of the substance of defendant Luce's testimony had he testified. Luce's prior conviction on narcotics charges would be more probative of his credibility had he testified that he had never used drugs in his life or that he knew nothing about the drug traffic than it would be if he testified only that he was not involved in the particular transactions for which he was charged. That the admissibility of the prior conviction depended on the defendant's testimony was recognized by the District Court when it indicated that the conviction would be inadmissible if Luce testified solely to rebut evidence of his flight from arrest, and not on the merits of his case generally.

When a defendant has not testified we similarly have no basis for deciding whether the District Court's ruling, if in error, was harmless. In *United States* v. *Fearwell,* 595 F.2d 771 (D.C. Cir. 1978), the District of Columbia Circuit decided that the trial court's ruling denying a motion *in limine* to exclude the defendant's prior conviction was in error. Because it could not determine whether the error was harmless, it remanded the case to the District Court to take the defendant's testimony so that the question of harmless error could be resolved. This procedure certainly has little to recommend it in terms of judicial efficiency. Moreover, the testimony given for the purpose of the motion *in limine* may differ significantly from that which would actually have been given at the trial.

There is also no hint in the record from which we can decide whether Luce was actually precluded from testifying by fear of impeachment or whether his testimony would have significantly aided his defense. As this Court said in *United States* v. *LeBlanc,* 612 F.2d at 1014, we

"cannot assume that it was the judge's ruling in question which prevented the appellant from testifying in his own behalf, . . . especially since the record indicates other tactical reasons why a decision not to testify might have been made."[4] (Footnote omitted.)

The policy underlying Federal Rule of Evidence 103 (a)(2) offers persuasive support for our position.[5] The Rule states:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

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[4] The Ninth Circuit's solution to this problem is to require the defendant to affirmatively establish on the record that he will in fact testify if his challenged prior convictions are excluded. *United States* v. *Cook,* 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), *cert. denied,* 444 U.S. 1034 (1980). Such a declaration by the defendant would be meaningless, however, as he may not constitutionally be forced to decide whether he will testify at any point before the close of his defense. *Brooks* v. *Tennessee,* 406 U.S. 605 (1972). The Ninth Circuit also requires that the defendant outline his proposed testimony in order to preserve the issue to review. If the defendant could be held to his outline, this requirement might ease our concern with a sufficient factual basis for review. If events in the trial could change a defendant's decision to testify, however, they could also change a defendant's mind about what areas to address in his direct testimony. This option would also require the defendant to reveal his testimony to the prosecutor, which could be a distinct tactical disadvantage.

[5] The rule is not literally applicable to the situation here since the District Court made no actual ruling admitting evidence. As the ruling claimed to be error was also not one excluding evidence, Rule 103(a)(2) does not apply.

> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record . . .; or
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the Court by offer or was apparent from the context within which questions were asked.

Evidence that is excluded must be included in the record through an offer of proof so that the reviewing court may have a clear basis from which to determine whether an error has been made. When a defendant has not testified, we are similarly without sufficient information to determine conclusively whether evidence of prior convictions could properly have been used to impeach. Without the defendant's testimony, any evaluation on our part of the probative value or prejudicial effect of his prior conviction is more likely to be "problematical and purely speculative." *United States* v. *Murray,* 492 F.2d 178, 197 (9th Cir. 1973), *cert. denied,* 419 U.S. 942 (1974).

Our decision not to review rulings *in limine* that impeaching evidence is admissible is not inconsistent with the Supreme Court's decision in *New Jersey* v. *Portash,* 440 U.S. 450 (1979). In *Portash,* the Supreme Court held that impeachment by prior statements made to a grand jury under a grant of immunity would violate the defendant's Fifth Amendment rights. The New Jersey trial court had ruled *in limine* that the defendant could be so impeached. The Supreme Court found that the merits of the constitutional question were properly before it because the New Jersey appellate court had considered the merits properly preserved for appeal, and federal law did not prohibit New Jersey from following such a procedure. Nothing in the majority opinion indicates whether the question would have been reviewable had the case arisen in federal court. *Portash,* 440 U.S. at 462-63 n.2 (Powell, J., concurring).

Justice Powell, in a concurrence joined by Justice Rehnquist, stated:

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.

440 U.S. at 462 (footnote omitted). Justice Blackmun, in a dissent joined by Chief Justice Burger, argued that the New Jersey court's evidentiary ruling did not present a judiciable "case or controversy." He found that reviewing Portash's claim was "unwise" as well as beyond the jurisdiction of the Court, stating:

> At a minimum . . . a requirement that such a claim be adjudicated on appeal only when presented by a defendant who has taken the stand prevents a defendant from manufacturing constitutional challenges when he has no intention of taking the stand and testifying in his own behalf. More fundamentally, such disembodied decision-making removes disputes from the factual and often legal context that sharpens issues, highlights problem areas of special concern, and above all, gives a reviewing court some notion of the practical reach of its pronouncements.

440 U.S. at 468. Although Justice Blackmun's analysis did not convince a majority of the Supreme Court that review of a state court's preliminary evidentiary ruling is unconstitutional, we find his reasoning persuasive that similar rulings in federal courts should not be reviewed on appeal.

Since defendant Luce did not testify at trial, and his prior conviction was not introduced into evidence, he cannot raise the question of its admissibility on appeal.

II.

The next issue raised by the defendants concerns the testimony of the government's first witness, Dallas Luigs. Over the defendants' objection, the district court allowed Dallas to testify that defendant James Luigs had told Dallas that James had to check with Luce concerning time schedules for cocaine drops. This statement was admitted under the co-conspirator exception to the hearsay rule. Defendants Luce and Luigs argue that this evidence was erroneously admitted because the district court used the wrong standard under this Court's decision in *United States* v. *Enright,* 579 F.2d 980 (6th Cir. 1978), in determining that a conspiracy existed and because the correct standard had not been satisfied.

Enright held that, under Federal Rule of Evidence 801(d)(2)(E), a co-conspirator's statement is not admissible as an exception to the hearsay rule unless the court determines by a preponderance of the evidence that the defendant and the declarant were co-conspirators. The trial court has considerable discretion in structuring the order of proof of conspiracy, however, and may consider the hearsay itself when making its preliminary finding of conspiracy. *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979), *cert. denied,* 444 U.S. 1074, *reh'g denied,* 445 U.S. 972 (1980). Defendants contend that the district court reequired only that the existence of a conspiracy be shown *prima facie* rather than by a preponderance of the evidence. During its ruling the district court did use the words "prima facie case." However, the District Court first articulated the burden in terms of "the preponderance of the evidence," and referred to the *Enright* case several times. The court mixed "prima facie" language with "preponderance" language, saying: "I find by a preponderance

of the evidence that a prima facie case of an acknowledged conspiracy has been shown to exist." It is also worth noting that in response to the defendant's motion for a new trial the District Court found specifically that "[t]here was obviously sufficient evidence under the *Enright, supra,* or other appropriate standards to find the defendant involved in the alleged conspiracy."

A fair reading of the record as a whole persuades us that the District Court used the term "prima facie case" either to refer to the preliminary finding by the court that a conspiracy existed, as distinguished from the jury's final determination of conspiracy, or to indicate that the preliminary finding of conspiracy was at that point still subject to rebuttal by evidence that there was no conspiracy.

Although the District Court's articulation of the burden might have been more clear, the record shows that it considered the evidence and found by a preponderance that defendants Luce and Luigs were co-conspirators. As there was sufficient evidence introduced at trial to support such a finding, it was not error to introduce the co-conspirator's statement into evidence.

III.

The defendants also claim that the following rulings of the District Court constituted reversible error: allowing evidence of Luce's fingerprint found on a plastic bag to be admitted without being sufficiently connected to the crime; allowing evidence of Luce's flight from police to be admitted; refusing to sever the trials of Kolofer and Luigs; accepting the qualifications of the expert witness who tested the cocaine samples; upholding the sufficiency of the evidence against Kolofer and Luigs; and refusing to suppress evidence seized under a search warrant. We have examined all of these contentions and find them without merit.

Accordingly, the judgments of conviction are affirmed.

No. 82-5326

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD LUCE.

Defendant-Appellant.

ORDER DENYING PETITION FOR REHEARING

(Filed October 3, 1983)

Before: KENNEDY, *Circuit Judge;* PECK, *Senior Circuit Judge;* and ALLEN,* *District Judge.*

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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* Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Office - Supreme Court, U.S.
FILED
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CLERK

No. 83-912 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD LUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a preliminary ruling by the district court, denying petitioner's motion to limit the government's ability to cross-examine him about a prior conviction, was reviewable on appeal after petitioner declined to testify at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-912

EDWARD LUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. A petition for rehearing was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on December 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to concurrent terms of four years' imprisonment,

to be followed by a three-year special parole term, and fined $3000 on each count. The court of appeals affirmed. Pet. App. 1a-13a.[1]

1. The evidence at trial, the sufficiency of which is not in dispute, established that James Luigs, Robert Kolofer, and petitioner conspired to sell cocaine to Dallas Luigs on October 1, 1981. Dallas Luigs had been arrested by local police officers several days before for possession of two and a half ounces of cocaine that he had bought from his cousin, co-defendant James Luigs (Tr. 67). He agreed to cooperate to avoid prosecution (Tr. 41-42, 126-127). Accordingly, he telephoned his cousin (Tr. 43) to arrange the purchase of more cocaine (Tr. 67).

James Luigs, a business associate of petitioner's (Tr. 44), flew from Chicago to Memphis on October 1 to consummate the sale. As they had done before, the two cousins drove to a Holiday Inn parking lot (Tr. 68-69).[2] James Luigs then went into the hotel, returned with Kolofer (Tr. 69), and opened the trunk of a Mercury parked in the lot. In the trunk was an attache case. James Luigs opened the case and took out a brown paper bag; inside the bag was another plastic bag, and in that were several smaller bags containing

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[1]Petitioner was acquitted on one count of possession with intent to distribute cocaine. Co-defendant James Luigs was also convicted on one count each of conspiracy and possession. Co-defendant Robert Kolofer was convicted on one count of possession. The court of appeals also affirmed their convictions.

[2]Dallas Luigs had been introduced to petitioner in the summer of 1981 (Tr. 44) and had twice purchased cocaine from him (Tr. 46-49). On one occasion petitioner sold cocaine to Dallas Luigs from a warehouse in Chicago (Tr. 46). On the second occasion petitioner flew to Memphis and distributed cocaine out of the trunk of an automobile parked at the Holiday Inn (Tr. 48-49). James Luigs also flew to Memphis twice and sold Dallas cocaine from the trunk of a car parked at the Holiday Inn (Tr. 50-53).

cocaine. Tr. 70, 207-208. Memphis police officers watching the parking lot then arrested James Luigs and Kolofer (Tr. 70, 133-134, 153-157). Petitioner's fingerprints were found on the larger cocaine-filled plastic bag (Tr. 227, 245, 262-263).[3] The Mercury was also circumstantially tied to petitioner: in 1980 petitioner had gone to an automobile dealership in a Chicago suburb and ordered the car. When the car was delivered, however, it was registered in the name of Richard R. Clark (Tr. 187-189). Police investigation revealed that no such person lived at the address given. No current driver's license was issued to a Richard R. Clark, and agents were unable to locate any such individual. Tr. 363-366.

In December 1981, DEA agents obtained a warrant for petitioner's arrest on the charges involved in this case. When they went to his office to execute it petitioner was not there; the agents left word for him to call them. Tr. 361-363. About an hour and a half later police officers saw petitioner entering a car parked behind the office. They approached him, identifying themselves, and petitioner sped away. After a high speed chase, converging police cars were able to stop petitioner and effect the arrest. Tr. 374-377.

2. At trial petitioner filed a motion in limine to restrict the government from using a 1974 conviction to impeach him if he chose to testify. Petitioner's primary objection was that he had been discharged under state law (see Ill. Ann. Stat. ch. 56½, § 710 (Smith-Hurd Cum. Supp. 1983-1984)), or that the prior conviction—allegedly for possession of

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[3]As part of its direct case the government introduced a card bearing petitioner's fingerprints, taken in December 1978 (Tr. 245; GX 13). Petitioner requested an instruction that the prints were not taken in connection with a criminal matter (Tr. 248), even though they had been taken when petitioner was picked up for a probation violation (Tr. 337). The court instructed the jury that it was not to draw any inference from the fact that petitioner's fingerprints had been taken previously (Tr. 250-251).

marijuana—had been expunged (Tr. 336). During prolonged conferences on the matter the government responded that it had no evidence of petitioner's discharge or expungement. State records did show that he had been arrested in 1978 for a probation violation relating to that conviction (Tr. 337-356). Petitioner did not rebut the government's contention and introduced no evidence of discharge or expungement.

Petitioner then argued that the probative value of his prior conviction for possession of marijuana was outweighed by its prejudicial effect, and that it should accordingly be excluded under Fed. R. Evid. 609(a)(1).[4] The court agreed that marijuana possession was not sufficiently probative of petitioner's honesty for such a conviction to be admissible (Tr. 350, 353-354). However, the government represented that petitioner had been convicted for possession of a controlled substance under an Illinois statute that did not include marijuana (Tr. 356-357; Ill. Ann. Stat. ch. 56½, § 1402 (Smith-Hurd Cum. Supp. 1983-1984)). When petitioner was unable to rebut the government's claim, the district court ruled that a conviction for a controlled substance other than marijuana was a "crime involving moral turpitude" that fell within the category of permissible impeachment evidence. Accordingly, it declined to exclude the prior conviction (Tr. 423-425). The court also noted that

[4]Rule 609(a) provides:

> **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

"if [petitioner] goes * * * into other elements, I don't know anything about drugs, I have never had any dealing with drugs * * * then the door is open to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense" (Tr. 426). The court ruled, however, that petitioner could give limited testimony explaining his flight to avoid arrest without being impeached by his prior conviction (Tr. 425-426). Petitioner chose not to testify at trial.

3. On appeal, petitioner contended that the district court abused its discretion in denying the motion in limine without making a specific finding that the probative value of the prior conviction outweighed its prejudicial effect. The court of appeals declined to reach the issue because petitioner had not testified at trial, and his prior convictions accordingly were not offered into evidence against him. Pet. App. 2a-12a.

The court advanced a number of reasons why a defendant who chooses not to testify should not be permitted to challenge the court's ruling in limine on appeal. First, an advisory ruling on a motion in limine is by definition preliminary, subject to change by the trial court "for whatever reason, when the evidence is actually offered and objected to at trial" (Pet. App. 6a (footnote omitted)). Second, because the trial court has discretion not to rule on motions in limine, overturning convictions on the basis of such rulings will ultimately discourage the practice of giving advisory rulings (*ibid.*). Third, a reviewing court in a case such as this would lack the "concrete factual basis [that] is required for appellate review of the merits of the evidence's admissibility" (Pet. App. 8a). Indeed, here there was not even any indication that petitioner "was actually precluded from testifying by fear of impeachment or whether his testimony would have significantly aided his defense" (Pet. App. 8a). Finally, allowing appeal here would make it

impossible for the reviewing court to decide whether the district court's error was harmless, since the court of appeals would have before it neither the defendant's proposed testimony nor the details of the government's cross-examination (Pet. App. 7a-8a).

DISCUSSION

This case presents a recurring and important question of criminal procedure that has divided the courts of appeals—whether a defendant may appeal the denial of his motion in limine to restrict the government's impeachment of his testimony when the defendant has thereafter declined to testify at trial. Because of the importance of the issue and the inter-circuit conflict, we do not oppose granting the petition for a writ of certiorari.

1. The court of appeals in this case held that a defendant who chooses not to testify may not seek review of the district court's preliminary ruling that the government may impeach him on cross-examination by introducing evidence of a prior conviction.[5] The Seventh Circuit has held that review is not available if the district court explicitly reserves the right to change its ruling on admissibility.[6] The Ninth Circuit has held that review is available, but only if the defendant has announced an unequivocal intention to testify if his motion is granted and outlined the substance of

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[5]The Ninth Cicuit until recently took the same position. See *United States* v. *Fulton*, 549 F.2d 1325, 1327 (1977); *United States* v. *Murray*, 492 F.2d 178, 197 (1973), cert. denied, 419 U.S. 942 (1974); *United States* v. *Walters*, 477 F.2d 386, 389, cert. denied, 414 U.S. 1007 (1973). The current Ninth Circuit rule was announced in *United States* v. *Cook*, 608 F.2d 1175 (1979) (en banc), cert. denied, 444 U.S. 1034 (1980).

[6]*United States* v. *Banks*, 687 F.2d 967, 970-972 (7th Cir. 1982), cert. denied, No. 82-5753 (Feb. 22, 1983); *United States* v. *Sternback*, 402 F.2d 353 (7th Cir. 1968), cert. denied, 393 U.S. 1082 (1969).

his likely testimony.[7] The First, Fourth, Fifth, Seventh, and District of Columbia Circuits have held that review is available even if the defendant has not shown a firm intention to testify, or has not made clear the substance of his testimony.[8] The Third Circuit has explicitly held that review is available, without addressing the question of the defendant's obligation to make a record.[9] The Second Circuit has implicitly held that review is available.[10] And the Eighth

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[7]*United States* v. *Cook*, 608 F.2d at 1186 (opinion of Goodwin, J.), 1188 (opinion of Wallace, J.), 1196-1197 (opinion of Hufstedler, J.); *United States* v. *Portillo*, 633 F.2d 1313, 1321 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); *United States* v. *Hendershot*, 614 F.2d 648, 651-652 (9th Cir. 1980). Cf. *United States* v. *Halbert*, 668 F.2d 489, 491-494 (10th Cir.), cert. denied, 456 U.S. 934 (1982). See also *United States* v. *LeBlanc*, 612 F.2d 1012, 1013-1015 (6th Cir.), cert. denied, 449 U.S. 849 (1980). The Sixth Circuit made its position more explicit in this case.

[8]*United States* v. *Kiendra*, 663 F.2d 349, 352 (1st Cir. 1981); *United States* v. *Whitehead*, 618 F.2d 523, 528 (4th Cir. 1980); *United States* v. *Toney*, 615 F.2d 277, 279 (5th Cir.), cert. denied, 449 U.S. 985 (1980); *United States* v. *Fountain*, 642 F.2d 1083, 1087 & n.3 (7th Cir.), cert. denied, 451 U.S. 993 (1981); *United States* v. *Lipscomb*, 702 F.2d 1049, 1069 (D.C. Cir. 1983) (en banc). Cf. *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir. 1979).

[9]*United States* v. *Provenzano*, 620 F.2d 985, 1002 n.22 (3d Cir.), cert. denied, 449 U.S. 899 (1980). Cf. *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979); *United States* v. *Langston*, 576 F.2d 1138, 1139 (5th Cir.), cert. denied, 439 U.S. 932 (1978). The Fifth Circuit has since made its position more explicit in *United States* v. *Toney*, *supra* note 8.

[10]*United States* v. *Hayes*, 553 F.2d 824, 826-828 (2d Cir.), cert. denied, 434 U.S. 867 (1977); *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969). Cf. *United States* v. *Cavender*, 578 F.2d 528 (4th Cir. 1978); *United States* v. *Williams*, 587 F.2d 1, 1-2 (6th Cir. 1978); *United States* v. *Brashier*, 548 F.2d 1315, 1326-1327 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Jackson*, 627 F.2d 1198, 1209-1210 (D.C. Cir. 1980); *United States* v. *Fearwell*, 595 F.2d 771 (D.C. Cir. 1978); *United States* v. *Smith*, 551 F.2d 348 (D.C. Cir. 1976). The Fourth (*Whitehead*), Sixth (this case), Ninth (*Cook*), and District of Columbia Circuits (*Lipscomb*) have since made their positions explicit. See also cases cited in Annot., 54 A.L.R. Fed. 694, 698-700 (1981).

Circuit has even permitted review in a case where the district court refused to rule on the motion in limine and the defendant then declined to testify.[11]

In *New Jersey* v. *Portash*, 440 U.S. 450 (1979), this Court addressed a similar issue. There a defendant in state court had failed to take the stand, and sought to raise on appeal his objection to a ruling that the prosecution could impeach his credibility by use of immunized grand jury testimony. Because the state appellate court found that the objection was preserved, this Court addressed the merits of the defendant's claim. 440 U.S. at 455; *id.* at 462-463 n.2 (Powell, J., concurring) ("the Court • • • does not decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court"). Justice Powell, joined by Justice Rehnquist, noted, however (*id.* at 462):

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.

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[11] *United States* v. *Burkhead*, 646 F.2d 1283, 1285-1286 (8th Cir.), cert. denied, 454 U.S. 898 (1981). In *United States* v. *Cobb*, 588 F.2d 607, 613 (1978), cert. denied, 440 U.S. 947 (1979), the Eighth Circuit held that a defendant who took the stand after his motion in limine was denied, and who himself volunteered the information about his prior conviction, thereby waived the issue. See also *United States* v. *Mariani*, 539 F.2d 915, 921 (2d Cir. 1976).

Justice Blackmun, joined by the Chief Justice, would have gone even further, finding "this adjudication of an abstract dispute not only • • • unwise" but also "beyond the [Article III] jurisdiction of the Court" (*id.* at 468) (Blackmun, J., dissenting).

2. As the sheer volume of cases cited above indicates, this issue is one that arises frequently. Indeed, by its very nature it is one that lurks in most prosecutions where the defendant is not a first offender, since the government may—within the constraints imposed by Fed. R. Evid. 609—impeach a testifying defendant by evidence of prior conviction of crime.

The question is also important as well as common. The consequence of the rule adopted by at least five circuits (see page 7 & note 8, *supra*) is that convictions may be overturned where there is no record for deciding whether the district court erred in its preliminary determination of admissibility. See, *e.g.*, Pet. App. 8a; *New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting); *United States* v. *Cook*, *supra* note 5, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part).[12] In this case, for example, evidence that petitioner had been convicted of an earlier drug-related offense would unquestionably be admissible if petitioner took the stand and denied any prior involvement with drugs. See, *e.g.*, *United States* v. *Gaertner*, 705 F.2d 210, 216-217 (7th Cir. 1983); *United States* v. *Mehrmanesh*, 682 F.2d 1303, 1309 (9th Cir. 1982); Tr. 426; Pet. App. 8a. On the other hand, it may be that Fed. R. Evid. 609(a)(1) would not permit cross-examination about petitioner's prior offense if his direct testimony were different.

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[12] Of course the defendant will still have the burden of showing error in the district court's determination—an undertaking that will be made difficult by his failure to make a record at trial.

Moreover, in cases like this where there "is no indication in the record • • • of the substance of [the] defendant['s] testimony had he testified" (Pet. App. 8a), it is difficult to determine whether any error in the ruling on prior crimes was harmless. See *United States* v. *Fearwell*, 595 F.2d 771 (D.C. Cir. 1978); cf. *United States* v. *Smith*, 551 F.2d 348 (D.C. Cir. 1976). It may be, for example, that the substance of the defendant's proposed testimony was so limited, difficult to credit, or repetitive of matters already proven through other witnesses, that his decision not to testify—even if motivated by an erroneous ruling regarding potential impeachment—would have had no real effect on the jury's determination of guilt. In addition, the court of appeals can only speculate whether the evidence of a prior conviction would have been highlighted or isolated on cross-examination, whether a limiting instruction would have minimized the prejudice, and whether the cross-examination as a whole would have been so exhaustive and damaging that any error arising from the Rule 609 ruling would have been harmless.

Indeed, in this case petitioner's "counsel did not [even] state that [petitioner] would take the stand if the motion were granted" (Pet. App. 2a)—and, of course, a defendant could not be held to any such undertaking even if made. To permit reversal of a conviction under those circumstances would simply invite a defendant to make such motions, and thereby "manufactur[e] [evidentiary] challenges when he has no intention of taking the stand and testifying in his own behalf." *New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting).

The dynamics of the trial process provide further reasons for holding, as the court of appeals did, that a Rule 609 claim is preserved only if the defendant takes the stand. Just as the lack of a record on appeal frustrates a reviewing court's ability to determine the existence of error, so the

defendant's failure to take the stand deprives the trial court of the opportunity to reconsider the correctness of its preliminary ruling in a concrete factual context—and deprives the prosecutor of the opportunity to decide for tactical reasons to forego the impeachment. The Seventh Circuit has held that review is not available if the district court explicitly reserves the right to change its decision on a motion in limine. See note 6, *supra*. But such a distinction between that case and this is purely formal, since resolution of a motion in limine is necessarily tentative, and will ultimately depend in most instances on the substance of the defendant's testimony. To preclude review only where the trial court makes an explicit reservation would simply lead courts to declare in each case what is already implicit.

In fact, permitting review and reversal in a case such as this could have more undesirable consequences. Because of the tentative nature of rulings in limine, the trial court need not make any decision at all on the question of impeachment by prior convictions until after the defendant has testified.[13] Adoption of that practice, though it would avoid the problem presented here, would leave defendants worse

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[13]See, *e.g.*, Pet. App. 6a; *United States* v. *Hickey*, 596 F.2d at 1087; *United States* v. *Oakes*, 565 F.2d 170 (1st Cir. 1977); *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part). But see *United States* v. *Burkhead*, 646 F.2d at 1285. Fed. R. Crim. P. 12(b) requires pretrial motions concerning only those matters "capable of determination without the trial of the general issue." And Rule 12(e) permits the district court "for good cause" to defer a motion "for determination at the trial of the general issue." See also *New Jersey* v. *Portash*, 440 U.S. 462 n.1 (Powell, J., concurring) ("there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented").

Though it is not relevant to the issue here, we note that the district court's ability to defer decision on the issue is restricted by Rule 12(e) when the government, rather than the defendant, seeks a pretrial ruling, since the government's "right to appeal [would otherwise be] adversely affected." Fed. R. Crim. P. 12(e).

off than would a ruling that decisions in limine are not reviewable. After all, a defendant who has the benefit of a preview of what the district court is likely to rule—even if the preview is unreviewable—is assuredly better off than one who must decide whether or not to testify simply on the strength of his lawyer's prediction. See *United States* v. *Cook*, 608 F.2d at 1189 (Kennedy, J., dissenting in part and concurring in part).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1984

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No. 83-912

In The Supreme Court of the United States

October Term, 1983

EDWARD LUCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES V. EDWARD LUCE

CR NO. 81-20341

DATE	PROCEEDING
12/17/81	Indictment

1/20/82	Order on Arraignment (1-15-82, Not Guilty . . .)
3/22/82	Jury Trial Begins
3/23/82	Deft. moved for judgment of acquittal— OVERRULED *as to Cts. 1 & 3;* *UNDER ADVISEMENT AS TO CT. 2.*
3/23/82	Motion *In Limine* to Exclude Impeachment by Evidence of Conviction
3/23/82	Memo in Support of Motion
3/24/82	Motion For Judgment of Acquittal as to Ct. 2— OVERRULED. Deft. Luce calls 2 witnesses; DEFENSE RESTS, JURY BEGAN DELIBERATIONS
3/25/82	Jury returned verdict of GUILTY as to *Cts. 1 & 3* & NOT GUILTY as to Ct. 2
3/25/82	VERDICT—GUILTY as to Cts. 1 & 3; & NOT GUILTY as to Ct. 2
3/29/82	Order on jury verdict
3/31/82	DEFT'S MOTION AND MEMORANDUM FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL CHJW
4/2/81	ORDER (*Filed 4-1-82:* Above motion for Judgment of Acquittal or New Trial— *OVERRULED*) CHJW, USA & PROB; mailed Marcus
5/18/82	*Disposition Hearing*: Ct. 1: 4 Yrs. impr., $3,000.00 committed fine. Ct. 3: 4 yrs. impr., 3 yrs. SPT, $3,000.00 committed fine. impr. to run concurrently.
5/24/82	Judgment and Commitment Order
5/18/82	Notice of Appeal

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO. 82-5236

DATE	PROCEEDING
6/7/82	Copy of notice of appeal, filed; and cause docketed
8/9/82	Judgment of the District Court affirmed (Kennedy, Peck and Allen, Opinion by Kennedy (COSTS NONE)
8/23/82	Petition for rehearing of appellant, Luce, with suggestion en banc (m-8/22)
10/3/82	Order denying petition for rehearing (Kennedy, Peck and Allen, JJ.)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 81-20341-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al.,

Defendant.

MOTION IN LIMINE TO EXCLUDE
IMPEACHMENT BY EVIDENCE OF CONVICTION

Now Comes the Defendant, EDWARD LUCE, by his attorney, JAMES I. MARCUS, and respectfully moves this Honorable Court as follows:

1. The government plans to introduce at trial evidence that Luce was convicted by an Illinois state court in 1974 for possession of marijuana, a conviction for which he received a sentence of eighteen months probation, under the provision of 56 ½ §710 Ill. Rev. Stat. (Ex. 1). Luce intends to testify in his own behalf.

2. Evidence of this conviction should be excluded as impeachment since the provision of 56 ½ §710 provides that upon fulfillment of the conditions of probation the criminal proceedings shall be dismissed, and no conviction shall be entered. Luce successfully completed his probationary period.

3. Moreover, this evidence does not constitute proper impeachment under Rule 609 of the Federal Rules of

Evidence. The conviction is not admissible under 609 (a) (2), because the crime does not involve dishonesty or false statement, nor is it admissible under 609 (a) (1), because the probative value of the evidence does not outweigh its prejudicial effect to the Defendant.

Wherefore, Defendant EDWARD LUCE prays that this court enter an order in limine absolutely prohibiting the government from introducing evidence of Defendant Luce's 1974 conviction for possession of marijuana, or from inquiring into such conviction on cross-examination.

Respectfully submitted,

James I. Marcus
Attorney for Defendant Luce

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 81 20341-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al.,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE IMPEACHMENT BY EVIDENCE OF CONVICTION

Now Comes the Defendant, EDWARD LUCE, by his attorney, JAMES I. MARCUS, and hereby submits his memorandum in support of Motion in Limine to Exclude Impeachment by Evidence of Conviction of a Crime.

In 1974 Defendant Luce was convicted in Illinois by a state court of possession of marijuana, thereafter, he was sentenced under the Cannabis Control Act (eff. date 8/16/71), and placed on probation pursuant to 56 ½ §710. There was no violation of probation and the Defendant successfully completed his probationary sentence. We submit that this is dispositive of this issue. However, in the event the court disagrees we make the alternative argument that the conviction would be improperly admitted under Rule 609.

Under Rule 609 of the Federal Rules of Evidence, impeachment by means of a criminal conviction is only permitted in 2 circumstances: first, if the crime was a felony

and its probative value outweighs its prejudicial effect to the Defendant 609 (a) (1), and *second*, if the crime involved dishonesty or false statement by 609 (a) (2).

Additionally, the government bears the burden of showing that the probative value of the conviction outweighs its prejudice to the Defendant. *United States v. Mahone*, 537 F. 2d 922 (7th Cir. 1976), *cert. denied*, 429 U.S. 1025 (1970). The factors to be considered by the court in balancing the probative value against the prejudice to the Defendant were set forth by then Judge Burger now Chief Justice in *Gordon v. United States*, 127 U.S. App. D.C. 343, 383 F. 2d 936, 940 (1967):

1. The impeachment value of the prior crime.
2. The point in time of the conviction and the witness' subsequent history.
3. The similarity between the post crime and the charged crime.
4. the importance of the defendant's testimony.
5. the centrality of the credibilty issue.

Accord, United States v. Sims, 588 F. 2d 1145, 1149 (6th Cir. 1978).

A prior narcotics conviction is of little impeachment value, because it bears little if any relevancy to veracity. *United States v. Puco*, 453 F. 2d 539, 542 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1971). Further, although the conviction falls within the ten year limit of Rule 609 (b), the fact that the conviction is eight years old and that the Defendant has had no further convictions clearly reduces the evidence's probative value.

The greatest prejudice to the Defendant, however, is caused by the similarity between the prior crime and the

crimes with which Defendant is being charged, here possession of cocaine and conspiracy to possess cocaine.

As the Fifth Circuit has noted, "the danger of unfair prejudice is greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence." *United States v. Martinez,* 555 F. 2d 1273, 1275 (5th Cir. 1977). In *United States v. Puco,* 453 F. 2d 539 (2d Cir. 1971), *cert. denied,* 414 U.S. 844 (1971), the trial court committed reversible error in permitting a prior narcotics conviction to be used to impeach a Defendant on trial for violation of federal narcotics laws. The court stated:

> The propensity of Puco's narcotics conviction to "influence the minds of the juror's improperly", [citation omitted] needs little elaboration. Reference to a defendant's criminal record is always highly prejudicial. The average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility. *Cf. Bruton v. United States,* 391 U.S. 123 (1968). The potential for prejudice moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial" 453 F. 2d at 542.

Similarly, in the instant case, the jury may well be tempted to use the prior narcotics conviction to convict Luce on a "bad man" theory. Further, if Luce is forced to run the risk of being impeached, he will be denied the opportunity to take the stand and convince the jury of his innocence.

Since the slight probative value of this impeachment evidence does not outweigh its prejudice to Luce, the evidence is inadmissible under Rule 609 (a) (1). Nor is the

evidence admissible under 609 (a) (2), since the conviction for possession of marijuana did not involve a crime of dishonesty or false statement. The Report of the conference committee states:

> By the phrase "dishonesty and false statement" the conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crime false, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused; propensity to testify truthfully. Conf. Rep. No. 93-1597, 93 Cong. 2d Sess. 9, *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7098, 7103.

Possession of marijuana clearly does not fall within the class of cases to which the Conference Report refers. *See United States v. Hastings,* 577 F. 2d 38, 41 (8th Cir. 1978); *United States v. Thompson,* 559 F. 2d 552, 554 (9th Cir. 1977), *cert. denied,* 434 U.S. 973.

Since the Defendant's 1974 conviction for possession of marijuana is not admissible under either Illinois law or Rule 609 (a) or (2), Defendant Luce's motion in limine should be granted.

Respectfully submitted,

JAMES I. MARCUS
Attorney for Defendant Luce

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• • •

EXCERPTS OF TRIAL IN
UNITED STATES v. LUCE, et al.
MEMPHIS, TENNESSEE
TUESDAY, MARCH 23, 1982

• • •

(p. 336) THE COURT: Now, we are aware, also, that the defendant in this case has moved to limit the government, because we think that this bears on the same kind of question here, is the defendant to be faced with evidence if he testifies, Mr. Luce, of a 1974 offense under the Illinois law.

• • •

(p. 337) That's the pertinent part of the purported section 710 under Chapter 56 and a half, apparently, of the Illinois laws.

Do you want to be heard in that respect, Mr. DiScenza?

MR. DISCENZA: Yes, Your Honor, I do. Because our indication is that he was not discharged under that section.

• • •

(p. 339) THE COURT: Whose burden is it to establish that?

MR. MARCUS: I think it is the government's. The government's clearly, if they are going to use the impeachment evidence, it is there [sic] burden.

I have an argument that I wish not abandon at this point in 609 . It is clearly the government's. If I impeach

one of their witnesses, and they don't answer with respect to a conviction, they say they were never convicted, I am sure that the court would —

THE COURT: What is your evidence, Mr. DiScenza, that he was convicted.

MR. DISCENZA: Number one, I can ask him about conviction. I can't prove it extrinsically anyway, the rule is pretty clear on that. The rule is, and the case law, if I have knowledge to support my question, I may ask him about a conviction that has carried a penalty in excess of one year or involves moral turpitude or theft, I mean, dishonesty, that is the law that I can ask him about that.

• • •

(p. 346) THE COURT: All right. Well, the question before the court is, then who has the burden of establishing whether it is a viable conviction.

And it is the defendant's position that it has been expunged under section 710.

• • •

(p. 347) MR. MARCUS: Judge, I have an alternate argument that I suggest. I have not prepared my client to (p. 348) answer these questions. I suggest we bring the jury back, and, you know, we can do this — have an opportunity to talk to him, at least about what I am going to ask. I have an alternate argument under 609 of the Federal Rules of Evidence that I have set forth.

The conviction, again I do not thing [sic] that would be proper.

Referring to Judge Burger, now Chief Justice Burger in the opinion of Gordon versus the United States. The impeachment value is slight. These would be the prejudicial impact of the conviction in this case. And there's very little bearing with respect to the veracity and narcotics conviction or drug related conviction has nothing to do with veracity, which I believe that is all that it is appropriately being introduced for.

THE COURT: Mr. DiScenza.

MR. DISCENZA: Your Honor, the rule is very clear, and it says that a conviction that carries a penalty in excess of one year or a conviction which has to do with moral turpitude or dishonesty may be introduced for impeachment, and I think that that, you know, that's the rule. It obviously carried a penalty of over one year, and we get to impeach him by asking him about it by crossing examining him about it.

MR. MARCUS: It is clearly discretionary.

(p. 349) THE COURT: It is a possession of marijuana charge?

MR. DISCENZA: That's right, possession of controlled substance.

All right. I am giving the court a DiScenza on interpretation of Illinois law, so I am not an expert on Illinois law, what I have been able to find over the lunch hour is that 710 is possession of marijuana, that relates to possession of marijuana. The other section that Your Honor read out was 1402.

MR. MARCUS: 1410.

THE COURT: That is a possession of controlled substance which does not included [sic] marijuana but hard narcotics.

MR. MARCUS: That's correct.

MR. DISCENZA: I understand that he has been arrested, and our rap sheet indicates, with both of those offenses.

MR. MARCUS: It is my understanding that there is only one conviction with respect to this particular case.

The inquiry I believe has to be weighed.

THE COURT: All right. I am going to do this, if you want to put on your defendant now; the only thing that he has got to worry about is perjury, everything (p. 350) else that he is going to say is going to be self-serving, the only thing that he has got to be worried about is perjury, get up here and make the statement and say you can't use it against him. If he gets up here and makes a false statement on the stand and DiScenza asks him, and if it is just possession of marijuana, I am not going to let the government bring it in. If he is charged with the other, and he says on the stand that isn't so, then I am expecting to see this gentleman back here again probably before another judge on a perjury charge.

Put your client on the stand and already stated what I am going to make my ruling one [sic]. I am going to leave it to you and your client to state what you are urging upon me and let him get up here on the stand under oath and say he wasn't charged with possession of a controlled substance, other than marijuana, it was a simple marijuana thing, I was put on 18 months. Shoot, everybody knows

everybody has a little marijuana around, I didn't do anything for 18 months, nothing wrong with that, no moral turpitude, I was a good boy and I got expunged, and based on that testimony the government is not going to be allowed to bring it in. I am expecting they are going to find out if that is true or not and your client will pay the consequences if it isn't.

MR. MARCUS: Let me suggest this to the (p. 351) court, I will attempt to run down the actual charge. He may have been charged with the other, too I am not suggesting that he wasn't. He may have been charged with the possession of a controlled substance other than marijuana. I am not trying to mislead the court in that respect. You are just concerned with what he entered a plea to, I believe, not with what he is charged with. Indeed, he may have been charged with the other more serious crime.

THE COURT: What the conviction was, yes, sir.

• • •

(p. 353) THE COURT: I have stated that if the defendant establishes, even by his own testimony and no record, but by his own testimony that all he pled to was possession of marijuana, and that he didn't know anything about anything other than he thought that he was expunged and had a basis for thinking that he was expunged and that was the end of it, then I am not going to let the government bring that in. If it is a controlled substance other than marijuana, I think that involves moral turpitude and I think that the government is entitled to go into it, but that is a question that remains.

The government has satisfied me that there was a conviction or a plea to something that involves a felony. I am saying that under the argument that you have made, if it is possession of marijuana under 403 or 609 or any of the other matters that would be pertinent, even though it may be relevant, I am not going to let the government go into it on (p. 354) a simple possession of marijuana rap.

And the question is whether it is more than that and whether or not there were implications thereafter which indicated that he did not perform the probationary sentence that was involved satisfactorily.

MR. MARCUS: Okay. I am sure the court will give me adequate time to again do my best. I am sure that the U. S. Government has far more power at its disposal to determine whether or not or what the disposition of this case is.

THE COURT: And I will expect them to utilize whatever means that they have to, with the data and the information which is in evidence here, to be able to check it out themselves, and I expect them to.

MR. MARCUS: So, you are putting alike [sic] burden on then [sic] to check this out.

THE COURT: I am putting alike [sic] burden on them, yes, sir, but there is one person that has some personal knowledge that counsel doesn't have, and you have the opportunity to obtain that personal knowledge that nobody else has from your client.

MR. MARCUS: Okay.

• • •

(p. 356) (Recess.)

MR. DISCENZA: Your Honor, for the record, I have just talked to the police officer from Chicago that is up here. I want to put on the record and know what we found out. In December of 1981 he, prior to Mr. Luce being arrested, pulled the criminal offense report the, State of Illinois offense report and it indicates as follows. It gives charges, convictions shows one charge of battery, damage to property.

Three possessions of controlled substances.

Six charges of unlawful use of weapon.

One charge of battery.

One charge of loss of property.

One charge of false I.D. numbers.

Of this, it shows a conviction of a controlled substance, it was not expunged as of 1981.

• • •

(p. 357) THE COURT: Because the court is allowing the evidence pertaining to flight to come in in light of the information that Mr. DiScenza has indicated, it may be, I am not making that decision, but it may be that the defendant may be permitted to testify concerning the circumstances pertaining to the arrest if that's all the testimony that the defendant is going to get into. Even if I find otherwise that the government is entitled to bring in the conviction, I will consider as to whether or not the defendant may still be permitted to testify as it bears upon the flight matter without the introduction of the information that has been obtained. I am considering that, but if he is going to go into general testimony relating to all of

the merits of the case, if I were otherwise disposed (p. 358) that the conviction is a proper matter to go into as it relates to credibility, I am just considering that separation as it relates to the issues that would pertain to the defendant's opportunity to testify as it pertains to the flight matter.

I will hear from you further, either or both counsel, as to that possibility, but I am considering that.

MR. MARCUS: Can I ask the court to reconsider the 609 argument. I accept Mr. DiScenza's representation of what the circumstances are with respect to the conviction. I am checking it out, but I certainly do not quarrel with him.

And I believe that I would like to note for my memorandum in motion that there is and incorrect statement on that, and I would ask the court, based on what Mr. DiScenza has recently reported, I would ask the court to separately consider under 609 whether or not that conviction should come in under that basis, that is, whether or not the prejudicial impact of the conviction would be outweighed by the probative value of it.

THE COURT: All right, sir. I will consider it. As I say, I may consider it as to the extent of testimony as it pertains to flight, or alleged flight would be a better way of putting it.

All right. Are we ready to proceed?

• • •

EXCERPTS OF TRIAL IN
UNITED STATES v. LUCE, et al.
MEMPHIS, TENNESSEE
WEDNESDAY, MARCH 24, 1982

• • •

(p. 421) THE COURT: Is there any further information in the matter on trial concerning the motion in limine situation as it pertains to the record or allegation as to the defendant Mr. Luce?

MR. DISCENZA: May it please the court, just about two minutes ago we checked with Lieutenant Flemming with the Chicago Police Department Identification Division, who indicates that the conviction on Mr. Luce was under 56 (p. 422) and a half 1402 it is still on record, and the Chicago Bureau of Identification or the identification section shows no expungement on that conviction and I think Mr. —

MR. MARCUS: Let me say that I don't want to mislead the court in any way. I have made my investigation, also, but I do not have any indication to indicate otherwise.

THE COURT: There is still before us the 609 question which counsel has raised, as well as the other matter, which would make it, in accordance with the defendant's context, inadmissible under the Illinois law. We don't think that the Illinois law applies.

MR. MARCUS: Your Honor, just to clarify that point, I have no information, I don't mean to interrupt the court, that argument — I think that the court is correct, so I don't want to mislead you or suggest otherwise with respect to that, I think that the argument at this point is just to 609.

THE COURT: It appeared to me that way, counsel, though during the course of yesterday and argument and the back and forth that came about, there was some question as to whether or not the Illinois law or some other provision might support the defendant's position that the government ought not to be able to get into as a matter of impeachment or credibility.

(p. 423) And the other argument relates to whether the probative value substantially outweighs the prejudicial affect of introduction of such evidence.

The court indicated yesterday in considering this matter, if it were a marijuana possession matter, that likely the court would consider that it should not be brought up. If it were a conviction for a controlled substance other than marijuana, the court's feeling was and is that that is a crime involving moral turpitude, and it would, therefore, fall within the pattern of admissible evidence for purposes of impeachment.

Now, I made one further suggestion yesterday as a possibility, that I invite counsel on either side to comment upon or address or state their position, that there might be a third basis, a hybrid sort of situation where, if the defendant were permitted to take the stand and testify concerning the evidence of flight, which was admitted over the objection of that same defendant, that the court might

permit the witness to testify in that area without allowing the government to bring in the impeachment or credibility factor. But if the defendant were going to take the stand and testify generally pertaining to his situation beyond the flight circumstance, then that the court would allow the government to go into that as a matter of impeachment.

So, I think that we are to that third alternative (p. 424) situation if the parties want to be heard about that.

MR. MARCUS: I recognize the court's invitation, but, you know, I have no comment on it. The court wants to make it available, certainly we will consider it if not —

THE COURT: Before I hear from you, do any other counsel, I have permitted each of you to state your position concerning these matters because in a conspiracy matter. I realize there may be a washover effect insofar as other defendants are concerned, if either of you want to be heard, I will hear from you about that alternative on these matters that relate to the prior conviction.

MR. MARTY: May we confer a second?

THE COURT: Yes, sir.

MR. MARTY: Your Honor, I think we have stated our position for the record, and we will have no comment on that either.

THE COURT: All right. Mr. DiScenza.

MR. DISCENZA: Of course, Your Honor, we think that under the rule that we ought to be able to use it as impeachment no matter what the defendant says. I mean, his credibility is still placed in issue, but we understand

Your Honor's ruling, whatever Your Honor wants to do about it, we will abide by it.

We might just call this to the court's attention. (p. 425) Obviously, the cross-examination is going to be on his perception of what was happening, his familiarity with police procedures, and et cetera. It very well could be material as impeachment, but as a direct matter of evidence, if he testifies about the events that occurred on December the 18th, you know, obviously, we would want to bring out he had gone through it before. He knew what police procedures were, he had prior arrests, and knew that he was supposed to stop, and et cetera.

THE COURT: I am going to rule, and note the exception on both sides, I am going to rule that the evidence pertaining to the prior offense of the defendant is sufficiently established that the government would be able to cross-examine the witness Luce if he takes the stand generally to testify to ask him with regard to his offense or prior conviction, which the court determines involves an offense of a penalty of more than one year and an offense that involves moral turpitude. And we would feel that the provisions of 609 would not preclude the government from going into that.

Then, on the other hand, if the defendant takes the stand and limits his testimony only to the circumstances pertaining to the alleged flight matter, affording him the opportunity, which I don't think that the rules would strictly support, but affording him the opportunity, if he (p. 426) wants to testify concerning, the circumstances of alleged flight, that he may do that without the conviction being brought in. But, if it goes beyond that at all into

other elements, I don't know anything about drugs, I have never had any dealings with drugs, I don't — whatever else, then the door is open to the government to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense, and that is the court's ruling.

MR. MARCUS: Your Honor, May I be heard just briefly. It is our contention that the fact, I obviously discussed this further with my client, but it is our contention, and I wish to note for the record, that we do not waive our objection to the flight evidence by this court's ruling. And if, indeed if anything, the court's suggestion on it would highlight that particular testimony that we have heard in this case from the government's witnesses. And it is not our position, and I want it perfectly clear, that we feel that this is a satisfactory resolution of the flight evidence that was presented, and I want that noted for the record.

THE COURT: I note the exception of the defendant, I have already noted the exception of the government, and that is very clear, you are not waiving that objection if you decide that you want to present your (p. 427) witness to testify in either or both directions, you just know what the court's ruling is and the record is clear about it.

MR. MARCUS: All right. I think that we have one other matter.

Have you concluded the 609 matter?

I assume we have.

THE COURT: Yes.

• • •

(p. 452) MR. MARCUS: We have no further witnesses. I won't [sic] to confer with Mr. Luce. I just got the court's ruling. I will tender my instructions, and I just want to confer with my client.

• • •

(p. 453) THE COURT: Are we ready to proceed?

MR. MARCUS: Your Honor, at this time The defense will have no further testimony and we will rest.

• • •

CR. NO. 81-20341-W

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNTED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al

Defendant.

LUCE'S MOTION AND MEMORANDUM FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Now Comes the Defendant EDWARD LUCE, by his attorney, JAMES I. MARCUS, and moves this court for Judgment of Acquittal or in the Alternative for a New Trial in support of this motion Defendant states as follows:

1. The court erred in failing to grant the Defendant's motion for judgment of acquittal at the close of the government's case as to Count I for failing to prove by the standard set forth in *Enright* that a conspiracy existed. *United States vs. Enright,* 579 F. 2d 980 (6th Cir. 1978).

2. The court erred in failing to grant Defendant's motion for judgment of acquittal at the close of the governments case as to Count III because the government failed to meet its burden of proof on the substantive count. (See Trial Brief).

3. The court erred in failing to limit the government's proof as to the impeachment by conviction of the

Defendant Edward Luce, who was thereby denied the right to testify. See Motion in Limine and supporting Memorandum which are incorporated by reference.

4. The court erred in failing to strike the testimony of officer Mattox, the latent fingerprint examiner, because of a failure to connect the latent print of Defendant Luce with the evidence introduced at trial.

5. The court erred in failing to give Defendant's requested instructions and in giving those instructions objected to by the defense specifically in giving the "Flight Instruction" over Defendant Luce's objection.

For the foregoing reasons Defendant Luce respectfully requests that this motion for judgment of acquittal be granted or in the alternative that he be granted a new trial.

Respectfully submitted,

JAMES I. MARCUS
Attorney for Defendant Luce

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NO. 81-20341

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

EDWARD LUCE, et al.

ORDER

(Filed April 1, 1982)

Following a jury trial in this case, in which the defendant was found guilty on certain charges, defendant Edward Luce has moved for judgment of acquittal or for a new trial. The Court has considered its notes and the record in the case, as well as the motion and memorandum filed on behalf of the defendant.

The defendant contends that the government failed to prove under the standards of *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978), that a conspiracy existed. The proof, however, if accepted by the tries of fact, indicated that the defendant Luce had a close association with one of the other defendants; had sold another co-conspirator a controlled substance; and was involved in the automobile in which a substantial quantity of cocaine was located; and that he had taken steps to attempt to conceal his identity with regard to the ownership of the automobile. Further, the defendant's fingerprints were found on one of the containers in which the cocaine was located during the course of the conspiracy. There was obviously sufficient evidence under the *Enright, supra,* or other appropriate standards to find the defendant involved in the alleged conspiracy under Count I.

The Court did not grant the defendant's motion for acquittal during the trial because the government met its proof, if the proof were accepted by the triers of fact, to establish the defendant's involvement, not only in the conspiracy, but in the substantive charge in which his automobile, his fingerprints, and his past association indicated involvement, aiding and abetting and participation in the substantive count charged in Count III.

The Court considered the defendant's motion to limit the government's proof with respect to whether the government would be allowed to cross-examine the defendant if he took the stand concerning a prior felony conviction. There was no basis established under the rules as to why the conviction should be excluded and it involved a drug offense in which in the Court's view, was both a felony and involved moral turpitude. Furthermore, the government stated that it would allow the defendant to testify on a limited basis without bringing in the proof of an alleged prior offense challenging credibility, if the defendant chose to testify concerning the circumstances of his arrest and purported flight from the attempted arrest. There was no error committed in respect of this matter, and the defendant exercised his option not to testify.

The Court determined that the testimony of the Memphis Police Officer investigating the crime scene was admissible with regard to steps taken in seeking fingerprints, and that there was a sufficient connection shown and established, not only by the testimony of Police Officer Mattox, but also through the testimony of other persons present at the scene to connect the lifting of prints with the particular print of the defendant Luce from the bag containing cocaine. There was no error in not striking the testimony of this witness in that respect.

The Court considered, with counsel for the defendant, instructions to be utilized in the case. For the most part, the Court used purposed instructions suggested by the defendant, or the substance of these instructions. The Court otherwise instructed in accordance with the law which has been utilized many times in this Court and in many instances supported by Sixth Circuit decisions.

For the reasons stated, the defendant's motion for judgment of acquittal and/or for a new trial is overruled. The Court will proceed to a disposition upon receipt of the pre-sentence report.

It is so ORDERED this 1st day of April, 1982.

/s/ Harry W. Wellford
HARRY W. WELLFORD, JUDGE
United States District Court

UNITED STATES DISTRICT COURT

Western District of Tennessee
Western Division

Docket No. 81-20341-01-W

JUDGMENT & COMMITMENT ORDER

(Filed May 24, 1982)

Defendant: Edward Luce

In the presence of the attorney for the government the defendant appeared in person on this date: May 18, 1982. Counsel:

( ) Without Counsel

(X) With Counsel—James Marcus, retained.

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assis'ance of counsel.
Plea:

( ) Guilty, and the court being satisfied that there is a factual basis for the plea,

( ) Nolo Contendere, (X) Not Guilty

There being verdict of:

( ) Not Guilty. Defendant is discharged

(X) Guilty.

Finding & Judgment: Defendant has been convicted of as charged of the offense(s) of Conspiracy (to possess and distribute a Schedule II controlled substance [cocaine];

Possession with intent to distribute a Schedule II controlled substance (cocaine); and aiding and abetting in same, in violation of Title 21, United States Code, Sections 846 and 841(a)(1) and Title 18, United States Code, Section 2, as charged in Counts 1 and 3 of the indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not

be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and fined in the amount of $3,000.00, said fine being a COMMITTED FINE, as to Count 1. As to Count 3, FOUR (4) YEARS, to run concurrently with sentence imposed in Count 1, and THREE (3) YEARS Special Parole Term to follow, and a $3,000.00 COMMITTED FINE, making a TOTAL SENTENCE of:

FOUR (4) YEARS imprisonment, followed by
THREE (3) YEARS Special Parole Term, and a
$6,000.00 COMMITTED FINE.

Special Conditions of Probation: The defendant has been granted leave by the Court to report to the institution designated by the Attorney General at his own expense no later than Noon, June 28, 1982. Upon designation of an institution to the United States Marshal, the Clerk will issue an Order to Surrender, stating when and where the defendant is to report. Upon receipt of the Order, the defendant will report to the Office of the Clerk to acknowledge receipt of the Order.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: U.S. District Judge Harry W. Wellford.

Approved: W. H. Ewing, Jr., U. S. Attorney.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

March 26, 1984

Robert B. Williams, Esq.
Williams & Marcus
111 West Washington Street
Suite 1866
Chicago, Illinois 60602

Re: Edward Luce v. United States
No. 83-912

Dear Mr. Williams:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted. Justice Stevens took no part in the consideration or decision of this petition."

Enclosed are memorandums describing the time requirements and procedures under the rules. Please read them carefully.

I have been instructed to inform you that Rule 34.1(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,

Alexander L. Stevas, Clerk

By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures

Office - Supreme Court, U.S
FILED
MAY 31 1984
ALEXANDER L. STEVAS
CLERK

(4)

No. 83-912

In The

Supreme Court of the United States

October Term, 1983

EDWARD LUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON MERITS

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QUESTION PRESENTED

Whether a defendant may appeal a ruling denying his motion *in limine* to preclude the introduction of a prior conviction, when, as a result of that ruling, the defendant later decides not to testify.

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No. 83-912

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EDWARD LUCE,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON MERITS

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236 (6th Cir. 1983).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 9, 1983. A petition for rehearing with *en banc* suggestion was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed within 30 days of that denial. This Court granted certiorari on March 26, 1984 (J.A.31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 609 (a) of the Federal Rules of Evidence, reads as follows:

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence out-weighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

STATEMENT OF THE CASE

Petitioner, Edward Luce, was convicted by a jury of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841 (a).[1] The trial judge sentenced him to concurrent terms of four years imprisonment and fined him $6,000.00, to be followed by a three (3) year special parole term. On appeal the Sixth Circuit Court of Appeals affirmed the convictions (Pet. App. 1a-13a).

The evidence at trial showed that on September 29, 1981, Tennessee State Drug Agents arrested Dallas Luigs, an unindicted co-conspirator, and charged him with possession of three ounces of cocaine and some quaaludes (R. 41, 67). Sometime after his arrest Luigs agreed to cooperate with State drug agents, who, in return, assured him that the federal authorities would not bring charges against him and that the State authorities would be notified about his cooperation through a "letter of recommendation" (R. 42-43). Once his "deal" was secured Luigs told investigators that he purchased cocaine from his cousin, James Luigs (R. 67). The State agents then instructed him to make another purchase of cocaine from James.

Acting on his cousin's request to purchase cocaine, James Luigs flew to Memphis from Chicago on October 1, 1981. After meeting at the airport, they drove to a local Holiday Inn where they were joined by Robert Kol-

[1]Petitioner was acquitted on Count II which also charged a violation of the federal drug laws. Co-defendant James Luigs was convicted on the same two counts, while Robert Kolofer was convicted on the possession count.

ofer, a co-defendant (T. 69). Thereafter, both were arrested in the hotel parking lot and, inside the trunk of the car, the agents recovered an attache case that, when opened, revealed a brown paper bag containing a large plastic bag filled with 16 smaller plastic bags (T. 70, 207-208). The small plastic bags were filled in part with a substance containing cocaine. One of Edward Luce's fingerprints was found on one of the plastic bags (T. 227, 262-263).[2]

In December 1981, DEA Agents obtained a warrant for Luce's arrest on charges in this case. When they initially went to Luce's office he was not there. In an unmarked squad car they returned that night, dressed in plain clothes. In the darkness they saw Luce enter his car, at which time they approached him, shined a flashlight in his face, and pointed the headlights of their car directly at him (T. 274-275). At a distance of approximately 50 feet one officer displayed his badge, while the other officer announced his office (T. 275). Luce started his car and left while the officers got back in their car to follow (T. 275). Upon seeing the first marked police vehicle Luce stopped and submitted to arrest (T. 275-276).

At trial Luce filed a motion *in limine* to exclude evidence of an earlier conviction, stating in his motion that he would testify in his defense (J.A.4). Luce argued in

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[2]While the contents of five of the sixteen bags were tested for illicit drugs, the remaining eleven bags went untested (T. 159). No evidence was ever introduced as to which bags contained cocaine and which bags did not. Significantly, the investigating officer could not identify on which bag Luce's print was found (T. 234). The Court, over objection, allowed the officer's testimony to stand (T. 236).

his motion that the prior conviction could not be proper impeachment evidence because Luce had been sentenced under Illinois' Special First Offender Probation Law for a marijuana offense, Ill. Rev. Stat. Chapter 56½, § 710, which provides that the criminal proceedings be dismissed and no conviction entered if defendant completes his probation satisfactorily. Alternatively, Luce argued that the conviction was improper impeachment evidence under Federal Rule of Evidence 609 because its prejudicial effect outweighed its probative value (J.A.6). It was later learned that the earlier conviction had been for possession of a controlled substance, not marijuana.[3] In response to the defense motion, the judge ruled that since the earlier crime involved moral turpitude, if the defendant chose to testify it would be admitted as impeachment (J.A.18). The Court, however, offered to preclude use of the conviction as impeachment if Luce limited his testimony to a response to the evidence of flight (J.A. 19-20). Luce declined this invitation and chose not to testify at his trial.

After the jury's verdict, Luce filed a post trial motion for Judgment of Acquittal or in the Alternative for a New Trial (J.A.24), based in part on the judge's earlier ruling denying his motion *in limine*. Once again the judge ruled that the prior conviction was "a drug offense in which in the Court's view, was both a felony and involved moral

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[3]Section 1410 of the Illinois Controlled Substances Act, however, contains similar expungement provisions for first offenders as does the Illinois Cannabis Control Act. In any event, the Government never provided the Court or the defense with the specific charge pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

turpitude" (J.A.27). The judge denied Luce's post trial motion.

On appeal, the defendant contended *inter alia* that the trial court failed to apply the proper balancing test mandated by Rule 609 (a) (1) with respect to his prior conviction. The Court of Appeals declined to reach this issue since Luce had failed to testify in his own behalf and therefore had not been impeached with his prior conviction (Pet. App. 2a-12a).

Thereafter, this Court granted a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit (J.A.31).

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals has erroneously ruled that a defendant who does not testify waives his right to appeal the trial judge's denial of his motion *in limine* to exclude the introduction of a prior conviction under Federal Rule of Evidence 609. While not expressly addressing the question in its form here, in both *Brooks v. Tennessee,* 406 U.S. 605 (1972) and *New Jersey v. Portash,* 440 U.S. 450 (1979), this Court did reach the merits of questions touching on the Fifth Amendment even though the defendants did not take the stand. The instant case bears a close resemblance to *Brooks,* which struck down a Tennessee statutory rule requiring a defendant to testify before any other defense witnesses. Responding to the suggestion that the defendant had waived an attack on the rule's violation of his Constitutional right

when he declined to testify, this Court observed that "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." *Brooks v. Tennessee,* 406 U.S. at 611 n.6. While the rule in *Brooks* imposed a penalty on defendant's right *not* to testify, the trial judge's ruling here imposed a penalty on defendant should he exercise his Constitutional right *to* testify. As such, the ruling must be appealable.

An error that keeps the defendant off the stand can be the most significant error in the defendant's trial. Indeed, this Court has recognized that "the testimony of an accused denying the case against him has considerably more force than counsel's argument that the prosecution's case has not been proved." *McGautha v. California,* 402 U.S. 183, 217 (1971). The alternative of scrupulously preserving the issue for appeal by testifying and enhancing the possibility of conviction is unrealistic because it ignores the fact the defendant's single most important goal at trial is acquittal, not injection of appealable error. It does not withstand reason to hold that the defendant waives the issue when, in an effort to compensate for the judge's erroneous ruling and win his case in spite of it, the defendant does not offer his own testimony.

The defendant's decision whether to testify or not is an important tactical decision as well as a matter of Constitutional right. *Brooks v. Tennessee,* 406 U.S. at 612. This right is diluted if a waiver arises when the defendant is forced into relinquishing his Constitutional right to testify in response to an erroneous ruling by the trial judge.

ARGUMENT

The question presented here is whether a defendant may appeal denial of a motion *in limine* to exclude a prior conviction, when, after an adverse ruling, the defendant declines to testify. Every circuit that has considered the issue but the Sixth has held, explicitly or implicitly, that such an adverse ruling is appealable. While the supporting rationales and procedural niceties formulated by each circuit have not been entirely uniform, none have adopted the blanket approach articulated by the Sixth Circuit that would preclude review unless the defendant responds to the ruling by taking the witness stand, suffering the impeachment, and enhancing his chances of conviction.[4]

Two cases from this Court shed light on the problem; and, while neither squarely addressed the issue in its form here, in both cases this Court reviewed preliminary rulings where the defendants, as a result of the rulings, declined to testify. In the first, *Brooks v. Tennessee,* 406 U.S. 605 (1972), this Court reviewed a Tennessee statutory requirement that compelled a defendant to testify before any other defense witness. This Court struck down the measure as unconstitutional despite the defendant's election in that case not to testify. While the dissenters suggested that there could be no violation of the right against self-incrimination because Brooks never testified, the majority rejected that notion with the observation that "the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of

[4]In its support for the Petition for Writ of Certiorari, at pages 6-8 nn. 5-11, the Government catalogues the various approaches adopted by the Circuits in addressing the issue.

the right." *Id.* at 611 n.6. The instant case is not so different from *Brooks* so as to justify a different result. While the Tennessee rule in *Brooks* imposed a penalty on defendant's initial exercise of his constitutional right *not* to testify, the trial judge's ruling here imposed a penalty on defendant should he exercise his constitutional right *to* testify. In both bases defendants faced rulings that imposed grave consequences on their decisions whether to give testimony on their own behalfs. In both circumstances defendants' decisions whether or not to testify were made in direct response to a preliminary ruling. This Court observed in *Brooks* that the Tennessee rule "cuts down on the privilege [to remain silent] by making its assertion costly." *Id.* at 610-11, quoting *Griffin v. California,* 380 U.S. 609, 614 (1965). The difference in petitioner's case is that the ruling by the trial judge here, if erroneous, cuts down on petitioner's privilege to *offer* testimony, by making that assertion costly. The question in *Brooks* and the question here present the two sides of one coin. The significant point is that in each case the ruling directly and substantially influenced the defendant's decision whether or not to exercise his Constitutional right to testify.

In the second case, *New Jersey v. Portash,* 440 U.S. 450 (1979), the defendant had moved *in limine* to preclude the state trial court from using immunized grand jury testimony against him should he testify. The trial court denied the motion, and the defendant did not testify as a result. New Jersey argued to this Court what the Government argues here—that the constitutional question is not presented when the defendant does not testify and therefore the impeaching testimony is never offered.

Before deciding the substantive issues in defendant's favor, this Court offered three grounds for reaching them: 1) the New Jersey trial court did rule on the merits of the constitutional question; 2) the New Jersey appellate court "necessarily concluded that the federal constitutional question had been properly presented"; and, 3) there was nothing in federal law to prohibit New Jersey from following such a procedure or to foreclose this Court's attention to it so long as the "case or controversy" requirement of Article III was met. *Id.* at 454-55. As Justice Powell pointed out in his separate concurring opinion, these reasons indicated that the majority did not intend to decide "whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court." *Id.* at 462-63 n.2. Nevertheless, it is instructive that in *Portash* as well as in *Brooks,* this Court elected to reach the merits of questions touching the Fifth Amendment right to testify despite the fact that in neither case did the defendant actually take the stand. *See United States v. Cook,* 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), *cert. denied,* 444 U.S. 1032 (1980).

The instant case involves the proposed introduction of a prior conviction, a piece of evidence that, not insignificantly, cannot be introduced automatically against a testifying defendant. This is in part because a prior conviction does not help the Government make a particular element of its case more or less probable; it serves only to impeach a defendant's credibility. Thus, Rule 609 enumerates several initial requisites and then requires the trial judge to balance other factors to insure that the prejudicial effect of the conviction's introduction does not outweigh its probative value. It depreciates the value

of the defendant's right to testify if he cannot appeal what may be the most significant error in his trial, an error that keeps him off the stand, because, in an effort to compensate for the error and win his case in spite of it, the defendant does not offer his own testimony. This injustice is especially egregious because the defendant has failed to testify in response to evidence that will not even specifically impeach or otherwise answer a particular aspect of his testimony. A prior conviction is not introduced to rebut something the defendant may say at trial—it is a collateral matter, offered to impeach the defendant's credibility generally. Any error allowing such impeachment at the expense of the Fifth Amendment right to testify must be appealable.

No wonder then that every federal circuit considering this issue, save the Sixth Circuit, has found some way to consider a claim of error in the admission of impeachment by way of a prior conviction even where the defendant declines to testify. Several of these courts specifically endorse a preliminary ruling as the preferred method of deciding Rule 609 issues, because it enables the defendant to make appropriate choices in preparing and structuring his case. *See United States v. Fearwell,* 595 F.2d 771, 779 n.22 (D.C. Cir. 1978); *United States v. Oakes,* 565 F.2d 170 (1st Cir. 1977); *United States v. Jackson,* 405 F.Supp. 938 (E.D. N.Y. 1975). This Court has recognized that the defendant's decision to testify "is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee, supra,* 406 U.S. at 612. No one has ever suggested that a ruling on this issue before a defendant testifies works any disadvantage to the prosecutor, who can also use the knowledge gained from the advance

ruling to better prepare his own case. If the enlightened view is that trials should not be fraught with surprise, then a motion *in limine* ruling with respect to Rule 609 is the preferred method of proceeding and the correctness of the ruling should be reviewable on appeal.

The Fifth Amendment privilege has two sides; not only does it guarantee the right not to testify, but the right to testify is also constitutionally guaranteed. No defendant can possibly make a knowing and voluntary choice regarding whether to testify when he does not know until afterwards whether his testimony will invite introduction of the most damaging impeachment possible against him. *Cf. Brewer v. Williams,* 430 U.S. 387 (1977); *United States v. Halbert,* 668 F.2d 489 (10th Cir.), *cert. denied,* 456 U.S. 935 (1982). Forcing the defendant to wait until he testifies before deciding whether a prior conviction will be admitted also makes for ineffective assistance of counsel, as no attorney could reasonably advise his client about the consequences of his testimony when he does not know whether he will be impeached by a prior conviction.

The fact is that a preliminary 609 (a) (1) ruling can dictate the course of the entire trial, and, as such, must be subject to judicial review. *See United States v. Cook, supra,* 608 F.2d at 1183. An error in this ruling requires the defendant to make a choice he otherwise might not have made. The suggestion that a defendant abandons his claim to appeal an erroneous ruling which so seriously effects his right to testify is unrealistic. *United States v. Kiendra,* 663 F.2d 349 (1st Cir. 1981); so is the suggestion that he scrupulously preserve the issue for appeal by testifying at the risk of conviction. One reason

offered in support of waiver is that a reviewing court will have no way of knowing whether a defendant actually would have exercised his right to testify when the appropriate moment arose; another is that a reviewing court will have no way of knowing the content of the defendant's testimony and therefore it could not determine whether the testimony would have influenced the outcome of the trial. This last argument suggests that the doctrine of harmless error outweighs serious infringements upon constitutional rights. In fact, the same argument could have been made to avoid reaching the issue in *Brooks.* Moreover, in other areas this Court has concluded that where constitutional issues are raised the question of prejudice need not be considered. *See, e.g., Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978). It is eminently more sensible to assume that the defendant would have testified and that his testimony would have been relevant, than it is to assume that he had nothing worthwhile to offer or that he made the motion as a ruse never intending to testify in the first place. *See United States v. Kiendra,* 663 F.2d at 352. It is certainly more just to tolerate the occasional ruse than to preclude an appeal when a trial judge makes an error of constitutional proportions.[5] If the Government is so convinced that a defendant does not intend to testify and is merely looking to place error in the record, then the Government has no need to contest the Rule 609 motion.

In fact, few judges have ever been reversed where a trial court balanced the competing interests and con-

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[5]Moreover, defense counsel as officers of the Court are deemed to file motions in good faith. A.B.A. Model Rules of Professional Conduct 3.1 and 3.3.

cluded that the prior conviction was admissible. This deference to trial judges should assuage any fears that ruling in favor of appealability will offer calculating defendants two chances in every trial, one without their testimony and a later chance, after their successful appeals, with their testimony. At trial, the defendant has but one goal—to obtain an acquittal. *United States v. Cook,* 608 F.2d at 1193 (Hufstedler, J., dissenting). In any event, putting aside the dubious notion that criminal defendants routinely elevate appealable error over acquittal as the object of their strategy, the history of appeals of Rule 609 motions shows that reversal will occur only in the most clear and intolerable instances of trial court error. And the very fact that appellate courts have been able to review the rulings answers the charge that a ruling on a Rule 609 motion, when the defendant fails to testify, is hypothetical.[6] Prior to trial the trial judge has all the information he needs in order to make a ruling on the admissibility of the prior conviction under Rule 609, and no factors are added when the defendant testifies which will affect that decision. If something did occur during the course of the trial, the trial court would certainly be free to modify its ruling. *See United States v. Oakes, supra; United States v. Jackson, supra.* This fear, moreover, that a defendant who knows his prior conviction will be inadmissible will now be able to lie with impunity, ignores the fact that Rule 609 applies to admissions of prior convictions for impeachment of truthfulness only. The conviction could come in,

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[6]Conversely, the fact that trial judges continue to rule on motions *in limine* concerning Rule 609 in the face of appellate review answers the charge that allowing review makes trial judges hesitant to rule on such motions.

for instance, under Rule 404,[7] or if the defendant got on the stand and flatly denied prior involvement in the area of the conviction. *See, e.g., United States v. Gaertner,* 705 F.2d 210, 216-17 (7th Cir. 1983); *United States v. Mehrmanesh,* 682 F.2d 1303, 1309 (9th Cir. 1982).

The facts in the instant case present a classic example of the unfairness of a rule precluding review when the defendant declines to testify. Federal Rule 609 (a) (1) provides that a prior conviction less than 10 years old may be admitted to impeach credibility only when the prior crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and when the Court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. The trial judge here never attempted any balancing when he ruled flatly that the Government could show in its cocaine prosecution that the defendant had been convicted of a drug related crime eight years earlier. The trial judge indicated that the earlier crime was a felony involving moral turpitude and would be admitted if the defendant testified. Attempting to bolster his ruling, the judge said that unless the conviction were shown the defendant could misrepresent himself to the jury as being unfamiliar with drugs (J.A.21). This analysis by the trial judge contains undocumented speculation and is inconsistent with decisions from this Court,

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[7]Federal Rule of Evidence 404 (b) states that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

appellate courts, and with the rules embodied in the Federal Rules of Evidence. Only by "attempting to prove his good name" does a criminal defendant open the entire subject of his character, *Michelson v. United States,* 335 U.S. 469, 479 (1948). In addition, adverse character testimony by the Government must be limited to the scope of the favorable testimony the defense offers. *Williams v. United States,* 168 U.S. 382, 397 (1897). *See also Michelson v. United States, supra,* 335 U.S. at 484 ("The cross-examination may take in as much ground as the testimony it is designed to verify."); *Agnello v. United States,* 269 U.S. 20, 35 (1925). Thus, adverse character testimony is not admissible until the defendant raises the question, 3A *Wigmore on Evidence* § 88 (3d ed. 1940); Fed. R. Ev. 424 (a) (1), and courts have consistently held that a defendant must be free to deny all elements of the case against him without placing his character in issue. *United States v. Holmes,* 26 Fed. Cases 349, 354 (D. Maine 1858); *United States v. Tomaiolo,* 249 F.2d 683 (2d Cir. 1957). In any event, aside from his misunderstanding about character impeachment generally, the trial judge made no effort to apply any of the balancing considerations mandated by Rule 609 (a) (1). *See, e.g., Gordon v. United States,* 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 396 U.S. 1030 (1970); *United States v. Harding,* 525 F.2d 84, 89 (7th Cir. 1975); *United States v. Palumbo,* 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969); *Weinstein's Evidence,* § 609 [03] (1976), and cases cited therein. Here, every relevant factor indicated exclusion was proper: age of the earlier conviction, similarity to current charge, effect on defendant's decision to testify. If the trial judge feared that Luce would misrepresent himself he could

have modified his ruling when and if the deception occurred. *See United States v. Oakes, supra; United States v. Jackson, supra.*

The Sixth Circuit's interpretation of waiver lets stand the trial judge's decision and thereby dilutes the value of defendant's constitutional right to offer testimony in his own behalf. In spite of the fact that the judge here may have misconstrued the law and failed to make any effort to balance the appropriate facts, thereby forcing the defendant into making a choice of constitutional proportion that he should not have had to make, the Sixth Circuit would find a waiver and allow the judge's erroneous ruling to be unappealable. Yet this erroneous ruling forced defendant out of exercising his constitutional right to testify in his own behalf. The doctrine of waiver cannot in fairness be stretched to the point that the Sixth Circuit finds here.

"[T]he testimony of an accused denying the case against him has considerably more force than counsel's argument that the prosecution's case has not been proved." So said this Court in *McGautha v. California,* 402 U.S. 183, 217 (1971), thus giving explicit recognition to the significance of a defendant's own testimony. The decision on whether or not to testify is not just a simple question of trial strategy. Indeed, a defendant is far more likely to testify as long as he has no record subject to introduction against him. Thus, when a trial judge makes an erroneous ruling under Rule 609, coercing a defendant into relinquishing his constitutional right to offer his own testimony, logic dictates that the ruling be subject to review. *United States v. Cook, supra,* 608 F.2d at 1183.

CONCLUSION

Because of the foregoing the decision of the United States Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD LUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a preliminary ruling by the district court, denying petitioner's motion to limit the government's ability to cross-examine him about a prior conviction, was reviewable on appeal after petitioner declined to testify at trial.

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. A petition for rehearing was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on December 1, 1983, and granted on March 26, 1984 (J.A. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to concurrent terms of four years' imprisonment, to be followed by a three-year special parole term, and fined $3000 on each count. The court of appeals affirmed. Pet. App. 1a-13a.[1]

1. The evidence at trial, the sufficiency of which is not in dispute, established that James Luigs, Robert Kolofer, and petitioner conspired to sell cocaine to Dallas Luigs on October 1, 1981. Dallas Luigs had been arrested by local police officers several days before for possession of two and one-half ounces of cocaine that he had bought from his cousin, co-defendant James Luigs (Tr. 67). He agreed to cooperate to avoid prosecution (Tr. 41-42, 126-127). Accordingly, he telephoned his cousin (Tr. 43) to arrange the purchase of more cocaine (Tr. 67).

James Luigs, who was a business associate of petitioner's (Tr. 44), flew from Chicago to Memphis on October 1 to consummate the sale. As they had done before, the two cousins drove to a Holiday Inn parking lot (Tr. 68-69).[2] James Luigs then went into the

[1] Petitioner was acquitted on one count of possession with intent to distribute cocaine. Co-defendant James Luigs was also convicted on one count each of conspiracy and possession. Co-defendant Robert Kolofer was convicted on one count of possession. The court of appeals also affirmed their convictions.

[2] Dallas Luigs had been introduced to petitioner in the summer of 1981 (Tr. 44) and had twice purchased cocaine from him (Tr. 46-49). On one occasion petitioner sold cocaine to Dallas Luigs from a warehouse in Chicago (Tr. 46). On the second occasion petitioner flew to Memphis and distributed cocaine out of the trunk of an automobile parked at the Holiday Inn (Tr. 48-49). James Luigs also flew to Memphis twice and sold his cousin cocaine from the trunk of a car parked at the Holiday Inn (Tr. 50-53).

hotel, returned with Kolofer (Tr. 69), and opened the trunk of a Mercury parked in the lot. In the trunk was an attache case. James Luigs opened the case and took out a brown paper bag; inside the bag was another plastic bag, and in that were several smaller bags containing cocaine (Tr. 70, 207-208). Memphis police officers watching the parking lot then arrested James Luigs and Kolofer (Tr. 70, 133-134, 153-157). Petitioner's fingerprints were found on the larger cocaine-filled plastic bag (Tr. 227, 245, 262-263).[3] The Mercury was also circumstantially tied to petitioner: in 1980 petitioner had gone to an automobile dealership in a Chicago suburb and ordered the car. When the car was delivered, however, it was registered in the name of Richard R. Clark (Tr. 187-189). Police investigation revealed that no such person lived at the address given. No current driver's license was issued to a Richard R. Clark, and agents were unable to locate any such individual (Tr. 363-366).

[3] As part of its direct case the government introduced a card bearing petitioner's fingerprints, taken in December 1978 (Tr. 245; GX 13). Petitioner requested an instruction that the prints were not taken in connection with a criminal matter (Tr. 248), even though they had been taken when petitioner was picked up for a probation violation (Tr. 337). The court instructed the jury that it was not to draw any inference from the fact that petitioner's fingerprints had been taken previously (Tr. 250-251).

In December 1981, DEA agents obtained a warrant for petitioner's arrest on the charges involved in this case. When they went to his office to execute it petitioner was not there; the agents left word for him to call them (Tr. 361-363). About an hour and a half later police officers saw petitioner entering a car parked behind the office. They approached him, identifying themselves, and petitioner sped away. After a high-speed chase, converging police cars were able to stop petitioner and effect the arrest (Tr. 374-377).

2. At trial petitioner filed a motion in limine to restrict the government from using a 1974 conviction to impeach him if he chose to testify (J.A. 4-5). In the motion petitioner asserted that the conviction had been expunged upon his successful completion of probation and contended that it was inadmissible under Fed. R. Evid. 609(a) because it did not involve dishonesty or false statement and because its prejudicial effect outweighed its probative value. In a mid-trial hearing outside the jury's presence, counsel reiterated that either petitioner had been discharged under state law (see Ill. Ann. Stat. ch. 56½, § 710 (Smith-Hurd Supp. 1984-1985)), or the prior conviction—allegedly for possession of marijuana—had been expunged (Tr. 336; see J.A. 11). The government responded that it had no evidence of petitioner's discharge or expungement (J.A. 10). State records did show that he had been arrested in 1978 for a probation violation relating to that conviction (Tr. 337-356). Petitioner did not rebut the government's contention and introduced no evidence of discharge or expungement.

Petitioner then argued that the probative value of this prior conviction for possession of marijuana was

outweighed by its prejudicial effect, and that it should accordingly be excluded under Rule 609(a)(1) of the Federal Rules of Evidence (J.A. 11-12).[4] The court agreed that if the prior conviction was for the possession of marijuana it would not be sufficiently probative of petitioner's honesty to be admissible (J.A. 13, 14-15). The government represented, however, that petitioner had been convicted for possession of a controlled substance under an Illinois statute that did not include marijuana (Tr. 356-357; Ill. Ann. Stat. ch. 56½, § 1402 (Smith-Hurd Supp. 1984-1985)). When petitioner was unable to rebut the government's claim, the district court ruled that a conviction for a controlled substance other than marijuana was a "crime involving moral turpitude" that fell within the category of permissible impeachment evidence. Accordingly, it declined to exclude the prior conviction altogether (J.A. 19-21). The court noted that "if [petitioner] goes * * * into other elements, I don't know anything about drugs, I have never had any dealing with drugs * * * then the door is open to the government to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense" (J.A. 21-22).

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[4] Rule 609(a) provides:

> General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The court ruled, however, that petitioner could give limited testimony explaining his flight to avoid arrest without being impeached by his prior conviction (J.A. 16-17, 21-22).

Petitioner chose not to testify at trial. Although he now claims (Br. 17) that the in limine ruling "forc[ed]" him to remain off the stand, petitioner did not assert before the district court that his decision not to testify was based on the anticipated impeachment, nor did he make an offer of proof or otherwise outline his proposed testimony.

3. On appeal, petitioner contended that the district court abused its discretion in denying the motion in limine without making a specific finding that the probative value of the prior conviction outweighed its prejudicial effect. The court of appeals declined to reach the issue because petitioner had not testified at trial and his prior convictions accordingly were not offered into evidence against him. Pet. App. 2a-12a.

The court advanced a number of reasons why a defendant who chooses not to testify should not be permitted to challenge the court's in limine ruling on appeal. First, an advisory ruling on a motion in limine is by definition preliminary, subject to change by the trial court "for whatever reason, when the evidence is actually offered and objected to at trial" (Pet. App. 6a (footnote omitted)). Second, because the trial court has discretion not to rule on motions in limine, overturning convictions on the basis of such rulings will ultimately discourage the practice of giving advisory rulings (*ibid.*). Third, a reviewing court in a case such as this would lack the "concrete factual basis [that] is required for appellate review of the merits of the evidence's admissibility" (*id.* at 8a). Indeed, here there was not even any

indication that petitioner "was actually precluded from testifying by fear of impeachment or whether his testimony would have significantly aided his defense" (*ibid.*). Finally, allowing review here would make it impossible for the appellate court to decide whether the district court's error was harmless, since the court of appeals would have before it neither the defendant's proposed testimony nor the details of the government's cross-examination (*id.* at 7a-8a).

SUMMARY OF ARGUMENT

Petitioner obtained an in limine ruling from the district court on the admissibility of a prior conviction for impeachment purposes. He subsequently chose not to testify at trial, and was convicted. Despite the preliminary nature of the decision on his motion and the lack of any record evidence that he would have testified had he prevailed on it, petitioner challenged the ruling before the court of appeals. That court properly declined to review the ruling. Any injury to petitioner arising out of the in limine ruling is wholly speculative. Reviewing decisions to admit evidence under Rule 609 only when a defendant has testified and the challenged evidence has actually been admitted over his objection at trial violates no right of petitioner and serves the important government interests of preventing defendants from manufacturing artificial claims for appeal and from securing reversals of convictions without a clear showing of prejudicial error.

An in limine motion such as petitioner's seeks an advisory ruling on an evidentiary issue that may arise at trial. A court normally need not decide such a motion. When it does, the parties may take the ruling into account as one factor among many in plan-

ning their trial strategy. The decision nonetheless is only a preliminary indication of how the court expects to rule. The ruling is subject to change if the court determines that its discretion should be exercised differently in light of the actual course of the trial, and the point may be moot if the prosecution elects not to introduce the evidence despite a favorable ruling on the motion in limine. It makes little sense to treat an in limine ruling as final and reviewable on appeal when it is recognized as tentative in the district court. Petitioner's claim of prejudice assumes not only that the ruling would have remained unchanged, but also that he would have testified but for the ruling and that the government would actually have offered the prior conviction to impeach his testimony. Moreover, an appellate court cannot properly review the balancing required under Rule 609(a)(1) outside the concrete context of actual testimony, nor can it determine whether any error was harmless.

Any injury that petitioner may claim from the in limine ruling is accordingly purely speculative. There is no evidence in the record that petitioner would have testified had he prevailed on the motion, nor did he make an offer of proof as to what his testimony would have been. Whether the government would have been able to offer the prior conviction on some ground other than Rule 609, or whether the evidence would have been offered at all, can only be guessed. Nor can one know how or on what basis the district court would ultimately have ruled had it been presented with the issue in the concrete context of petitioner's actual testimony at trial. Whether a decision admitting evidence of the conviction at trial would have been error and, if so, whether such an error

would have been harmless similarly cannot be ascertained on this record.

In contrast to the hypothetical injury that petitioner asserts stands the concrete claim of prejudice that he could have made had he actually taken the stand and the evidence been admitted. There is of course no question but that a ruling actually admitting the prior conviction over petitioner's objection would have been reviewable on appeal. Deciding whether to testify—and thereby to obtain a reviewable evidentiary ruling—is just one of a number of difficult tactical choices that a defendant must make. But the fact that it is difficult does not mean that a defendant must be permitted to escape the consequences of his choice by challenging a preliminary ruling without taking the stand. A defendant has no constitutional right to an in limine ruling, nor does the erroneous admission of a prior conviction rise to the level of a constitutional violation. In such circumstances, there is no persuasive claim to a right to challenge an in limine ruling on appeal, nor is there any unfairness in limiting a defendant's evidentiary challenges on appeal to evidence that was actually introduced at trial.

Far from being constitutionally mandated or necessary to ameliorate unfairness, reviewability of in limine rulings such as the one at issue here would offer defendants undue opportunity to seek to inject reversible error without sufficient countervailing benefits to the judicial process. A decision by this Court that such rulings are reviewable would be seen as an invitation to defendants to file numerous in limine motions respecting matters that may in fact not be critical to their decision whether to testify, in the hope that one might be erroneously denied and thus

provide the basis for overturning a conviction. One court of appeals has sought to diminish this risk by conditioning reviewability on a defendant's commitment on the record to testify if the motion is granted, and to make an offer of proof regarding the content of his proposed testimony—conditions petitioner did not satisfy. But even these precautions would be of only limited assistance in discouraging unwarranted motions, because any such commitment would be unenforceable at trial and review of the correctness of the in limine ruling would remain unduly speculative in the absence of the defendant's actual testimony at trial.

ARGUMENT

THE DISTRICT COURT'S PRELIMINARY RULING DENYING PETITIONER'S MOTION TO PROHIBIT CROSS-EXAMINATION ABOUT A PRIOR CONVICTION WAS NOT REVIEWABLE ON APPEAL AFTER PETITIONER DECLINED TO TESTIFY AT TRIAL

A. The Ruling Was Necessarily Tentative And Any Injury To Petitioner Was Purely Speculative

An in limine ruling gives the parties a preliminary indication of how the court intends to decide an evidentiary question should the evidence actually be offered at trial.[5] Such a tentative ruling, even if erroneous, cannot in itself provide the type of concrete injury and complete factual record necessary for proper review on appeal.

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[5] "In limine" means "[o]n or at the threshold; at the very beginning; preliminarily" (*Black's Law Dictionary* 708 (5th ed. 1979). While it is sometimes taken to refer only to motions made before trial, it is often used, as we use it here, to refer to any motion, whether before or during trial, "to exclude anticipated prejudical evidence before the evidence is actually offered by the opposing party." *State* v. *Rodriguez*, 126 Ariz. 28, 30, 612 P.2d 484, 486 (1980).

1. In limine motions are commonly used to obtain advisory rulings on evidentiary issues before the evidence is offered for admission at trial. There is normally no right to such an advance ruling. See pages 20-22, *infra*. When an in limine ruling is made, it may provide useful guidance for the parties, but it is nonetheless only an advisory determination, subject to change. See Pet. App. 5a-6a; *United States* v. *Key*, 717 F.2d 1206, 1208 (8th Cir. 1983) (per curiam). As petitioner acknowledges (Br. 14-15), the court retains the ability to modify its initial ruling based on the actual course of the trial.

This is particularly necessary in the context of Rule 609(a)(1), because a court cannot exercise its discretion in balancing the probative value and prejudicial effect of a prior conviction without taking into account factors that depend on the course of trial, such as the defendant's actual testimony and the decisiveness of his credibility. See *United States* v. *Key*, 717 F.2d at 1208-1209; see generally *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965); *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). For example, impeachment evidence may assume an unanticipated relevance where the defendant affirmatively denies involvement in the sort of activity that was the subject of a prior conviction.[6] See *United States* v.

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[6] Indeed, the district court in the instant case may have intended to admit the prior conviction only in such circumstances. The difficulty in determining the district court's precise ruling (see J.A. 16-17, 19-20, 21-22) is itself a reason for precluding review of it on appeal. See *New Jersey* v. *Portash*, 440 U.S. 450, 467-471 (1979) (Blackmun, J., dissenting). The court apparently agreed to exclude the prior drug conviction if the defendant limited his testimony to his flight before arrest, but said that it would be admitted if the defend-

Gaertner, 705 F.2d 210, 216-217 (7th Cir. 1983); *United States* v. *Mehrmanesh*, 682 F.2d 1303, 1309 (9th Cir. 1982); cf. *Walder* v. *United States*, 347 U.S. 62 (1954). It would be anomalous to treat an in limine ruling as final and reviewable if the defendant does not take the stand even though it is clearly subject to change if the defendant does indeed testify and the evidence is offered.[7] Cf. *United States* v. *Toney*, 615 F.2d 277, 282 (5th Cir.) (Tjoflat, J., concurring) (describing difficulties inherent in considering an in limine ruling final), cer denied, 449 U.S. 985 (1980).

2. A number of other factors also contributes to the necessarily speculative nature of any injury that may be claimed as a result of an limine ruling. Cf. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 (1973) ("[s]everal contingencies must coalesce" before injury could occur). Most important, there can be no assurance that the defendant whose in limine motion to exclude evidence was denied would actually have taken the stand had he prevailed on the motion. See *New Jersey* v. *Portash*, 440 U.S. 450, 467 (1979) (Blackmun, J., dissenting). In the present case, "[t]here is * * * no hint in the record from which

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ant denied prior involvement with illegal drugs (J.A. 21-22). In an important respect, then, the court ruled in favor of petitioner, who made no showing of what his testimony would have been or, in particular, whether he desired to testify with respect to any subject other than his flight before arrest.

[7] Because in limine rulings are inherently subject to change, it makes little sense to preclude review, as does the Seventh Circuit, only where the district court explicitly reserves the right to reconsider its decision. See *United States* v. *Banks*, 687 F.2d 967, 970-972 (7th Cir. 1982), cert. denied, 459 U.S. 1212 (1983).

[a reviewing court] can decide whether Luce was actually precluded from testifying by fear of impeachment" (Pet. App. 8a).

There are in fact several considerations that the defendant and his counsel must weigh in deciding whether he should take the stand. See, *e.g.*, *Crampton* v. *Ohio* (decided with *McGautha* v. *California*, 402 U.S. 183, 214-216 (1971)); *United States* v. *Grayson*, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting). In *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), for example, this Court held that it is unconstitutional to require a defendant to decide whether to testify before any other defense witnesses have testified, because of the defendant's crucial need of "an opportunity to evaluate the actual worth of [his] evidence" (*id.* at 612) in deciding whether he should take the stand.[8] See *United States* v. *Cook*, 608 F.2d 1175, 1189 (9th Cir. 1979) (en banc) (Kennedy, J., dissenting in part and concurring in part) ("the actual conduct of the trial is a significant, and legitimate, factor in a defendant's election to testify or remain silent"), cert. denied, 444 U.S. 1034 (1980). Thus, while an in limine ruling may be an important factor in the defendant's decision, it cannot normally be regarded as decisive in itself. *New Jersey* v. *Portash*, 440 U.S. at 467 (Blackmun, J., dissenting) (an accused's decision whether to testify "seldom turns on the resolution of one factor among many"). See also *United States* v. *LeBlanc*, 612 F.2d 1012, 1014 (6th Cir.), cert. denied, 449 U.S. 849 (1980); cf. *United States* v. *Pantone*, 634 F.2d 716, 723 (3d Cir. 1980). Certainly it should not simply be presumed to be the

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[8] Here, petitioner in fact called another witness after the court's ruling (see Tr. 431).

basis for the defendant's decision, as petitioner would have this Court do.

A requirement that a defendant, "by a statement of his attorney * * * establish on the record that he will in fact take the stand and testify" (*Cook*, 608 F.2d at 1186) thus should be a minimum prerequisite to reviewability—one petitioner cannot satisfy here. Even that rule, while preferable to requiring no record at all, is hardly sufficient to convert a hypothetical injury into one concrete enough to support reviewability. See pages 30-31 note 22, *infra*. Because such an undertaking is unenforceable (see generally *Brooks*, 406 U.S. at 613), there can be no assurance that a defendant has in fact decided not to testify solely because of the in limine ruling or that, if the ruling be reversed, he will take the stand upon retrial. Cf. *United States* v. *Spinella*, 506 F.2d 426 (5th Cir.), cert. denied, 423 U.S. 917 (1975).

An in limine ruling also provides insufficient proof of injury because the government could decide at trial to forgo the use of a prior conviction for impeachment purposes even though the court has indicated that it would probably admit the evidence. See generally *New Jersey* v. *Portash*, 440 U.S. at 467 (Blackmun, J., dissenting). The prosecutor may, for example, decide that there is sufficient impeachment evidence apart from the prior conviction, or that the defendant's testimony did not effectively counter his case. Such forbearance is particularly likely where the balance between prejudicial effect and probative value is close, so that there is a real risk of reversal. In such a situation the prosecutor is more likely to choose to protect a conviction from attack on appeal than to introduce evidence that does not appear necessary to his case. See *United States* v. *Cobb*, 588 F.2d 607, 613 (8th Cir.), cert. denied, 440 U.S. 947 (1979).

Finally, a prior conviction that a court erroneously ruled admissible under Rule 609 may properly have been admissible under a different rationale. For example, other crimes may be admitted for a variety of purposes under Rule 404(b). See, *e.g.*, *United States* v. *McCollum*, 732 F.2d 1419, 1424 (9th Cir. 1984). Here again, however, the admissibility of the evidence depends in large part on the actual course of trial. See *United States* v. *Beechum*, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763, 771-773 (1961); Fed. R. Evid. 404 advisory committee note (b).

3. In view of all of these contingencies, there can be no assurance that a defendant was actually prejudiced by even a demonstrably erroneous in limine ruling under Rule 609. Appellate review is also problematic because, in the absence of a concrete record of a defendant's trial testimony and the admission of a prior conviction, an appellate court can neither review the district court's exercise of discretion nor determine whether the error, if any, was harmless. Appellate review of the balancing required under Rule 609(a)(1)[9] is hampered in the absence of a

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[9] Petitioner's contention (Br. 15) that the district court "never attempted any balancing" is belied by the court's ruling that the evidence would be admissible if petitioner denied prior involvement with drugs (in which case it would have significant probative value), but not if he limited his testimony to explaining his flight before arrest (where the probative value would be less). See J.A. 21-22.

trial record for the same reasons that the district court requires such a record. See page 11, *supra*. The record is especially vital for review purposes because it will place the district court's exercise of discretion in a factual context. Review of an in limine ruling outside such a context will tend to be a largely academic inquiry rather than a determination of the reasonableness of an exercise of discretion. Compare *United States* v. *McCollum*, 732 F.2d at 1424-1426 (concluding that probative value outweighed prejudicial effect of prior conviction under Rule 404 (b) where defendant did not take the stand) with 732 F.2d at 1428-1429 (Reinhardt, J., dissenting) (concluding that prejudicial effect outweighed probative value).

In order to determine the effect of error on a trial, moreover, an appellate court normally must carefully review a complete factual record.[10] See *United States*

[10] An exception arises where the error is "case-dispositive," that is, where it affects the very ability of the government to introduce sufficient evidence to convict the defendant, as is often the case with rulings on suppression motions. Erroneous evidentiary rulings seldom fall into that category.

Examination of the history and policy underlying Fed. R. Crim. P. 11(a)(2), which now allows conditional guilty pleas in federal courts, is particularly instructive on the need to evaluate legal issues in a concrete factual context. Pursuant to the rule, a defendant may plead guilty yet reserve the right to challenge certain legal issues on appeal. Both the rule itself, which requires approval by the prosecutor and the district court, and the accompanying conference committee notes recognize that conditional pleas are meant for case-dispositive matters that need not be evaluated in the context of a complete trial and that such pleas should not be permitted with respect to " 'issues that cannot be adequately reviewed without a full trial record.' " *United States* v. *Curcio*, 712 F.2d 1532, 1537 (2d Cir. 1983), quoting *United States* v. *Burns*, 684 F.2d 1066,

v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 10-13; *id.* at 4-7 (Stevens, J., concurring in the judgment). For example, where evidence of guilt is overwhelming or the wrongfully admitted impeachment evidence is merely cumulative of other evidence, the error may often properly be viewed as harmless. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 763 (1946); see also *United States* v. *Simpson*, 709 F.2d 903, 908 (5th Cir. 1983), cert. denied, No. 83-5496 (Oct. 31, 1983); *Government of The Virgin Islands* v. *Bedford*, 671 F.2d 758, 762 (3d Cir. 1982); *United States* v. *Spero*, 625 F.2d 779, 782 (8th Cir. 1980).

When a defendant does not testify, the reviewing court is required to evaluate a trial court's discretionary evidentiary ruling outside a concrete and complete factual setting, and hypothetically to determine the existence and degree of prejudice to the defendant had the proposed impeachment actually occurred. The appellate court will, however, lack the factual record necessary to determine whether the

1073 (2d Cir. 1982), cert. denied, No. 82-5609 (Jan. 24, 1983). See also *United States* v. *Thibadeau*, 671 F.2d 75, 80-81 (2d Cir. 1982); *United States* v. *Lace*, 669 F.2d 46, 57 n.7 (2d Cir. 1982) (Newman, J., concurring), cert. denied, 459 U.S. 854 (1982); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1226 (1977); Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1286 (1978); Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 576 n.54 (1980); Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 U.C.L.A. L. Rev. 360, 370, 375, 378, 381 & n.101 (1978); D. Epstein & D. Austern, Crim. Just. Sec. ABA, *Uniform Rules of Criminal Procedure: Comparison and Analysis* Rule 444(d) (July 1975); cf. *United States* v. *Cox*, 464 F.2d 937, 945 (6th Cir. 1972).

potential error would have been cured by the trial court or the prosecutor, or whether other circumstances would have rendered the evidence properly admitted or the ruling harmless error. Most significantly, it will lack the defendant's testimony, which might have turned out to be largely immaterial to the factual and legal issues of the case.[11] Consequently, if error, an evidentiary ruling allowing impeachment of proposed testimony may be subject to virtually automatic reversal when the defendant does not testify. See *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring). See also pages 29-31 & note 22, *infra*. A defendant who chooses to testify, on the other hand, will be entitled to reversal only if he can point to actual prejudice. This inequality in result will not only furnish an additional appellate issue to a defendant who "has no intention of taking the stand and testifying in his own behalf" (*New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting)), but will also encourage defendants to forgo the opportunity to testify, since, if they are convicted, they can still raise their evidentiary point on appeal and thus have an opportunity to force a retrial—at which they may or may not elect to testify—if the ruling was erroneous.

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[11] The importance of the defendant's actual testimony is demonstrated in the instant case, where petitioner may well not have gone beyond what the court said it would permit without admitting the impeachment evidence. See pages 11-12 note 6, *supra*.

B. It Is Not Unfair To Require A Defendant To Testify In Order To Preserve His Claim That Impeachment Evidence Was Inadmissible

It is wholly proper to require that a defendant in petitioner's position take the stand and that impeachment evidence actually be admitted over his objection in order to preserve the claim of prejudicial error in the ruling that such evidence was admissible. Such a procedure violates no rights of the defendant, constitutional or otherwise. Moreover, the courts have a clear interest in this procedure in order to ensure that such arguments are reviewed for prejudice in a concrete factual context and to prevent defendants from manufacturing claims of reversible error.

1.a. Petitioner's claim (Br. 8-13, 17) that his constitutional right to testify was infringed by the court's in limine ruling is manifestly incorrect. A defendant who testifies is subject to impeachment just as is any other witness. *Jenkins* v. *Anderson*, 447 U.S. 231, 235-236 (1980); *Grunewald* v. *United States*, 353 U.S. 391, 420 (1957); *Raffel* v. *United States*, 271 U.S. 494 (1926). The constraints facing a defendant who is subject to impeachment if he takes the stand "arise solely from the fact that the defendant is quite properly treated like any other witness who testifies at trial." *United States* v. *Grayson*, 438 U.S. 41, 57 (1978) (Stewart, J., dissenting). A violation of Rule 609 accordingly does not rise to the level of an unconstitutional infringement of the right to testify or a deprivation of due process. See *Leno* v. *Gaughan*, 664 F.2d 314 (1st Cir. 1981) (per curiam); *United States* v. *Belt*, 514 F.2d 837, 846-850 (D.C. Cir. 1975) (en banc); *Hubbard* v. *Wilson*, 401 F. Supp. 495, 498-500 (D. Colo. 1975); cf. *Spencer* v. *Texas*, 385 U.S. 554, 560-

562 (1967) (upholding recidivist statutes under which jury learns of accused's prior convictions); *Marshall* v. *Lonberger*, 459 U.S. 422, 437-438 & n.6 (1983).[12]

Significantly, petitioner had no right to a preliminary ruling on the admissibility of the prior conviction.[13] "Neither the fifth and sixth amendments

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[12] For this reason, petitioner's reliance (Br. 9-10) on *New Jersey* v. *Portash*, *supra*, is wholly misplaced. In *Portash*, the Court concluded that use for impeachment purposes of testimony compelled after a grant of immunity violates the constitutional guarantee against self-incrimination (440 U.S. at 459-460). Here, by contrast, petitioner can claim only a violation of an evidentiary rule that is not of constitutional dimension. Cf. *Middendorf* v. *Henry*, 425 U.S. 25, 48 n.25 (1976) (exposure to greater punishment in order to receive assistance of counsel does not impermissibly burden exercise of right to counsel where right itself does not independently exist). Moreover, the Court in *Portash* addressed the claim only because the state court considered it adequately preserved for appeal (440 U.S. at 455). The Court accordingly did not "decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court" (*id.* at 462-463 n.2 (Powell, J., concurring)). Indeed, the dissenting Justices concluded that the claim was too speculative to be reviewed even though the state court had decided otherwise. *Id.* at 467-468 (Blackmun, J., dissenting). The holding in *Portash* thus goes only so far as to establish that Article III does not preclude appellate review of in limine rulings.

[13] In criminal cases, pretrial motions may raise "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue." Fed. R. Crim. P. 12(b). Rule 12(e) permits the court "for good cause" to defer ruling on a pretrial motion until trial. Of course where, as here, the motion is not made until after trial has begun, the requirements of Rule 12(e) do not apply. Moreover, because the balancing mandated by Rule 609(a) depends critically on the actual course of trial (see page 11, *supra*), it is doubtful

nor the Federal Rules of Evidence impress upon a trial court a duty to aid the defendant in formulating his trial strategy regarding the risks of impeachment

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that motions under this Rule are a proper subject for definitive pretrial determination under Rule 12(b). Even if they are, the need to take into account the actual course of trial would surely constitute "good cause" for deferring the ruling under Rule 12(e). See *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part). Cf. *United States* v. *Ciampaglia*, 628 F.2d 632, 637-638 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (court must make co-conspirator determination at close of the evidence).

In *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), the court of appeals held that the district court abused its discretion in failing to rule on an limine motion under Rule 609 because the convictions in question were on substantive counts charged in the same indictment as the conspiracy charge on which the defendant was then being tried. The court of appeals recognized that "[i]n the usual case, the district court * * * has discretion to refuse to rule in advance of trial on the admissibility of impeachment evidence," but declared that "this case falls so far outside the ordinary situation that the district court's failure to rule * * * amounted to an abuse of discretion" (646 F.2d at 1285). No decision of the Eighth Circuit since *Burkhead* has reversed on the basis of a failure to rule on a preliminary Rule 609 motion. See, *e.g.*, *United States* v. *Gustafson*, 728 F.2d 1078, 1084 (8th Cir. 1984); *United States* v. *Rivers*, 693 F.2d 52, 54 (8th Cir. 1982).

Although it is not relevant to the issue here, we note that the district court's discretion to defer decision is restricted by Rule 12(e) when the government, rather than the defendant, seeks a pre-trial ruling, since the government's "right to appeal [would otherwise be] adversely affected." Fed. R. Crim. P. 12(e). See generally *United States* v. *Barletta*, 644 F.2d 50 (1st Cir. 1981).

should he decide to take the stand." *United States* v. *Witschner*, 624 F.2d 840, 844 (8th Cir.), cert. denied, 449 U.S. 994 (1980). See also *New Jersey* v. *Portash*, 440 U.S. at 462 n.1 (Powell, J., concurring) ("there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented"); Pet. App. 6a; *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part); *United States* v. *Tercero*, 640 F.2d 190, 196 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir.), cert. denied, 444 U.S. 853 (1979); *United States* v. *Key*, 717 F.2d at 1208; *United States* v. *Johnston*, 543 F.2d 55, 59 (8th Cir. 1976). Without such a right, petitioner's argument must fail: if he can be required to take the stand without benefit of an in limine ruling in order to raise the impeachment issue on appeal, he can surely be required to do so where, in its discretion, the court has provided him with preliminary guidance on the question.

The advance ruling provided such guidance for petitioner, but it in no way compelled him to remain silent, nor did it threaten a penalty if he chose to testify.[14] Cf. *Brady* v. *United States*, 397 U.S. 742,

[14] Petitioner's analogy (Br. 8-9) to *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), is inapt. In *Brooks*, the Court invalidated a state statute that required a defendant to testify before presenting any other witnesses, or not at all. The statute violated the right to remain silent because it "imposed a penalty for petitioner's initial silence [by prohibiting him from thereafter taking the stand], and that penalty constitutes the infringement of the right" (*id.* at 611 n.6). Here, by contrast, petitioner was free to decide whether or not he would testify.

750 (1970) (defendant's decision to take the stand or face certain conviction is not compelled); *Brooks* v. *Tennessee*, 406 U.S. 605, 614 (1972) (Burger, C.J., dissenting) (same); *United States* v. *Grayson*, *supra* (sentencing judge's consideration of defendant's false trial testimony does not impermissibly chill right to testify). See also *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984), slip op. 14; *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Crampton* v. *Ohio*, 402 U.S. at 213-215; *Harrison* v. *United States*, 392 U.S. 219, 222 (1968). For all these reasons, the in limine ruling, even if erroneous, implicated no concerns of constitutional magnitude.[15]

See generally *Jenkins* v. *Anderson*, 447 U.S. at 235-246; *Crampton* v. *Ohio*, 402 U.S. at 215; *Harris* v. *New York*, 401 U.S. 222 (1971); *Brown* v. *United States*, 356 U.S. 148 (1958). Cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). The in limine ruling neither compelled petitioner to testify nor required him to remain silent. It simply informed him of one of the likely consequences of his decision.

[15] Petitioner's argument to the contrary "attempts to elevate a matter of trial tactics to the level of a constitutional question" (*United States* v. *Witschner*, 624 F.2d at 844). But even if the ruling did raise constitutional problems, petitioner would still not be entitled for that reason alone to present his claim on appeal after refusing to testify. See Westen & Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 Am. Crim. L. Rev. 521, 523-527 (1982) (individuals may be required to raise constitutional claims by procedure that is least burdensome to the state); *New Jersey* v. *Portash*, 440 U.S. at 462-463 & n.2 (Powell, J., concurring) ("preferred method" of raising unconstitutional impeachment claim is for defendant to testify and appeal from a conviction).

Moreover, there is nothing in Rule 609 itself to suggest that in limine rulings should be reviewable. Cf. Westen & Mandell,

b. Petitioner's argument ultimately comes down to the assertion that the in limine ruling must be reviewable because otherwise he would be left with a difficult choice—whether to take the stand, risk impeachment and raise his evidentiary claim on appeal if he is convicted, or to forgo testifying in the belief that this would give him the best chance of acquittal.[16] The argument proves too much, for its logic would require courts to rule in all cases on in limine motions brought under Rule 609. Otherwise, defendants would be left with a tactical decision even more difficult than that faced by petitioner—they

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supra, 19 Am. Crim. L. Rev. at 524 (nothing in Fifth Amendment favors any particular procedure for preservation of self-incrimination claims). The court of appeals' suggestion to the contrary in *United States* v. *Cook* (608 F.2d at 1184) is plainly wrong. While Congress presumably intended that appellate review of Rule 609 rulings be available, there is no indication that it desired to broaden the availability of such review beyond what is normally provided when evidence is actually admitted over an objection. Indeed, to the extent that the Federal Rules of Evidence and of Criminal Procedure throw any light on the question, they suggest simply that review is generally available only when a party is prejudiced by the admission of evidence at trial over an objection. See Fed. R. Evid. 103(a); Fed. R. Crim. P. 52(a). See also 28 U.S.C. 2111.

[16] Petitioner's argument is that "a preliminary 609(a)(1) ruling can dictate the course of the entire trial, and, as such, must be subject to judicial review" (Br. 12). His related assertion that his failure to testify should not be construed as a "waiver" of his claim on appeal (*id.* at 12-13; see also *United States* v. *Cook*, 608 F.2d at 1184) confuses the concepts of waiver of a constitutional right and failure to follow proper procedures for preserving an issue for appeal. See generally *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976); see also Westen & Mandell, *supra*, 19 Am. Crim. L. Rev. at 523.

would have to decide whether to testify and risk impeachment without any indication by the court whether it will admit the evidence in question. But, as we have made clear, petitioner had no right to an in limine ruling (pages 20-22, *supra*). He accordingly has no right to obtain review of such a ruling, which provided guidance but was not designed to eliminate the need for him to face and make what concededly may have been a difficult decision.

Difficult choices are in any event "a necessary part of the criminal justice system" (*Middendorf* v. *Henry*, 425 U.S. 25, 48 (1976)), and even though they may not be "easy or pleasant * * * to make" (*South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983)), "the Constitution does not by that token always forbid requiring [a defendant] to choose" (*Crampton* v. *Ohio*, 402 U.S. at 213). There is nothing impermissible in confronting defendants in the position of petitioner with the "choice of litigation tactics" (*Jenkins* v. *Anderson*, 447 U.S. at 238) in deciding whether to testify in order to preserve an evidentiary claim for appellate review.

As we have demonstrated, a decision to admit a prior conviction under Rule 609 does not implicate or burden any constitutional right. This Court has held in a variety of contexts that government-imposed choices may properly affect the exercise of constitutional rights. See, *e.g.*, *South Dakota* v. *Neville*, *supra* (decision whether to take blood-alcohol test); *Jenkins* v. *Anderson*, *supra* (impeachment of defendant by pre-arrest silence); *United States* v. *Grayson*, *supra* (untruthful trial testimony may be considered at sentencing); *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978) (lesser punishment available if defendant pleads non vult rather than exercising right to jury

trial); *Chaffin* v. *Stynchcombe*, *supra* (jury may sentence defendant to greater term on retrial after appeal than he received at first trial); *Crampton* v. *Ohio*, *supra* (capital defendant may be tried at single proceeding to determine guilt and punishment). *A fortiori*, the tactical decision confronting petitioner here—involving no burden on a constitutional right—is not prohibited.

Petitioner's contention that he was influenced in his decision not to testify by the in limine ruling—even if accepted—in no way requires that the ruling be reviewable on appeal. See *Brady* v. *United States*, 397 U.S. at 756-757; *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954); cf. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 20. Where an adequate procedure is available for a defendant to challenge a ruling, he can legitimately be required to adhere to that procedure or else to forfeit his claim. See, *e.g.*, *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *McMann* v. *Richardson*, 397 U.S. 759, 768 (1970); *id.* at 782 n.5 (Brennan, J., dissenting); *Walker* v. *City of Birmingham*, 388 U.S. 307, 316-318 (1967); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289 (1975); Fed. R. Crim. P. 12(b) and (f); Westen & Mandell, *To Talk, to Balk, or to Die: The Emerging Fifth Amendment Doctrine of the "Preferred Reponse,"* 19 Am. Crim. L. Rev. 521, 523-527 (1982). For example, where a defendant has entered a guilty plea, he may not later attack his conviction on the ground that the plea was influenced by an erroneous ruling or view of the law.[17] His proper course is "to

[17] The exception now provided for conditional guilty pleas is not applicable to evidentiary claims such as petitioner's. See page 16, note 10, *supra*.

contest his guilt, prevail * * * at trial, on appeal, or, if necessary in a collateral proceeding, and win acquittal" (*McMann* v. *Richardson*, 397 U.S. at 768). He is not permitted to circumvent the normal avenues of review simply on a claim that a particular factor influenced his tactical decisions.

An adequate procedure for review was clearly available here:[18] if petitioner had taken the stand and the prior conviction had been admitted over his objection, he could have raised his claim on appeal. Indeed, Justice Powell, concurring in *Portash*, clearly expressed (440 U.S. at 462 (footnote omitted)) the desirability of presenting claims in this manner:

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.

[18] Petitioner should have been aware that he might forfeit his evidentiary claim by not testifying, because prior Sixth Circuit precedent suggested this result. See *United States* v. *LeBlanc*, 612 F.2d 1012 (6th Cir.), cert. denied, 449 U.S. 849 (1980). Moreover, Justice Powell's admonition (*New Jersey* v. *Portash*, 440 U.S. at 462-463 n.2 (concurring opinion)) that this may be the only proper way to preserve such a claim in federal courts was available years before petitioner was tried. In any event, a defendant need not be explicitly advised of the proper procedure for preserving claims where it should reasonably have been evident to him. See *United States* v. *Knox*, 396 U.S. 77 (1969); *United States* v. *Kordel*, 397 U.S. 1 (1970).

There can be no claim that such a procedure would not adequately protect petitioner's interest in obtaining review of the court's evidentiary ruling.[19] Compare *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Fay* v. *Noia*, 372 U.S. 391, 439-440 (1963); *Green* v. *United States*, 355 U.S. 184 (1957). For these reasons, a defendant may legitimately be required to testify in order to preserve for appeal his challenge to a ruling admitting a prior conviction under Rule 609.

2. The societal interest in the fair and efficient administration of criminal justice is clearly furthered by a rule ensuring that evidentiary claims such as the one here at issue are reviewed only when evidence is actually offered and admitted over a defend-

[19] While petitioner may of course have preferred an acquittal at his first trial and toward that end have decided not to testify, he could not ignore the need to establish a record to support his claims on appeal in the event of a conviction. To the extent that these courses may have conflicted, petitioner could properly be required to choose between them. See *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954) (defendant cannot challenge on appeal the denial of his motion for acquittal at close of prosecution's case when he supplies missing element of proof as part of his own case). See generally *United States* v. *Jorn*, 400 U.S. 470, 484 (1971) (plurality opinion) (society is not required "to assure the defendant a single proceeding free from harmful governmental or judicial error"). This is precisely the type of choice "with which criminal defendants and their attorneys are quite routinely faced" (*Crampton* v. *Ohio*, 402 U.S. at 215), and "it is not * * * inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify" (*ibid.*). See *United States* v. *Cook*, 608 F.2d at 1188-1189 (Kennedy, J., dissenting in part and concurring in part).

ant's objection.[20] This requirement is necessary to "prevent defendants with no real intention of testifying from creating artificial * * * challenges to their convictions." *New Jersey* v. *Portash*, 440 U.S. at 462 (Powell, J., concurring) (footnote omitted). See also Pet. App. 7a; *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *id.* at 1191 (Kennedy, J., dissenting in part and concurring in part) (issue is "what are the most sensible requirements for establishing prejudice where evidence of prior convictions is erroneously ruled admissible in a federal trial"). A decision from this Court holding that in limine rulings are reviewable even when the evidence in question is not actually offered at trial would serve as a considerable inducement to defendants to file preliminary motions in the hope of manufacturing reversible error, even though the ruling on the motion is not in fact the dispositive consideration in their decision whether to testify. *See New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting).

Such a result would hardly be conducive to the fair administration of criminal justice.[21] Because of the difficulties inherent in determining whether an erroneous in limine ruling actually prejudiced a defend-

[20] See, *e.g.*, Westen & Mandell, *supra*, 19 Am. Crim. L. Rev. at 551 ("there are compelling reasons why a state might prefer that a defendant respond to threatened impeachment by taking the witness stand").

[21] Confronted with the reversal of convictions because of errors in preliminary rulings, district courts might well become more reluctant to decide in limine motions, preferring instead to rule only when impeachment evidence is actually offered at trial (Pet. App. 6a). All parties would be left worse off without the benefit of the court's advice.

ant (see pages 11-18, *supra*), appellate courts could "'become * * * mired in harmless error.'" *United States* v. *Hasting*, slip op. 10 (quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)).[22] See generally *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 4-6. Unless courts scrupulously require that non-testifying defendants make a clear showing of prejudicial error, they will often prevail because appellate courts may prove reluctant to find an error harmless in light of the necessarily speculative nature of their inquiry. See Pet. App. 7a; *United States* v. *Cook*, 608 F.2d at 1191 (Sneed, J., dissenting in part and concurring in part); *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring). A defendant who testifies, on the other hand, will often have a more difficult

[22] If such rulings are to be reviewable, this Court should at least make it clear that the burden will be on the defendant to demonstrate prejudice from the denial of his motion. The defendant

> would thus need to show not only that he would have testified but for the adverse Rule 609 decision and what his testimony would have been, but must also meet the burden of demonstrating that his testimony would more probably than not have altered the jury verdict.

United States v. *Cook*, 608 F.2d at 1188 (citation omitted) (Wallace, J., concurring). Cf. *United States* v. *Rivers*, 693 F.2d at 54 (defendant seeking an in limine ruling must produce sufficient facts to enable the court to rule, including a showing that he will testify if he prevails and what his testimony will be). Accordingly, should the Court decide, contrary to our position, that in limine rulings may be reviewed on appeal even when the defendant does not take the stand and the evidence in question is not admitted, we submit that the Court should, at a minimum, adopt the requirements set forth by the court of appeals in *United States* v. *Cook* (608 F.2d at 1186):

> [T]o preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

Cf. Fed. R. Evid. 103(a)(2) (offer of proof). We emphasize that such an approach is hardly sufficient to overcome all of the difficulties raised by reviewability of in limine rulings. Because a defendant cannot be held to his representation that he will testify, such a representation will not in itself establish prejudice. See, *e.g.*, *United States* v. *Lipscomb*, 702 F.2d 1049, 1069-1070 (D.C. Cir. 1983); *United States* v. *Fountain*, 642 F.2d 1083, 1087 n.3 (7th Cir.), cert. denied, 451 U.S. 993 (1981). Moreover, even where a defendant offers the court his testimony in advance, his actual trial testimony may for a variety of reasons be different (see Pet. App. 9a n.4; *United States* v. *Oakes*, 565 F.2d 170, 171 (1st Cir. 1977)). How far the government may go in cross-examining a defendant in advance is also unclear (*United States* v. *Toney*, 615 F.2d at 282 (Tjoflat, J., concurring)), even though such cross-examination may be relevant to the admissibility of the evidence in question. Should the court rule in defendant's favor, but for any reason change the ruling at trial after the defendant has testified, the defendant "will claim something akin to 'entrapment'" (*ibid.*). Cf. *United States* v. *Clark*, 732 F.2d 1536, 1541-1542 (11th Cir. 1984) (court changed jury instruction from that accepted at charge conference). Moreover, the in limine procedures, even as circumscribed, can provide no assurance that the prosecutor would in the event actually decide to introduce the challenged evidence. Finally, even after all the time consumed by a hearing, and even crediting a defendant's representation that he would have testified, it will still be difficult to review the correctness of the ruling and to determine whether, if error, it actually prejudiced the defendant. *United States* v. *Toney*, 615 F.2d at 281 (Tjoflat, J., concurring); *United States* v. *Cook*, 608 F.2d at 1189 (Kennedy, J., dissenting in part and concurring in part)).

task in demonstrating prejudice; indeed, when the evidence ultimately is not offered, is not admitted, or is admitted for a concededly proper purpose, he will—quite properly, of course—have lost his claim on appeal altogether. There is no justification for granting non-testifying defendants such an advantage over those who do take the stand. Cf. Westen & Mandell, 19 Am. Crim. L. Rev. at 525 n.13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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